Supreme Court, U.S.
FILED
JUN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 87-6431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WAYNE T. SCHMUCK,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 16, 1988
CERTIORARI GRANTED MAY 16, 1988

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RELEVANT DOCKET ENTRIES

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9-21-83	Arrg. WLG. Apps: Johnson for govt. Steinberg for deft w/deft present. PLEA: N.Guilty entered by crt because deft stands mute on 12ct indictment. *PTO entered* for 10-6-83 at 2:00pm.
10-5-83	Mo to dism indictmt.
10-24-83	Memo in suppt of deft's mo to dism the indictmt.
10-27-83	Memo in oppost to dism by govt.
11/1/83	Deft's Reply Brf.
11-14-83	Order to dism indictmt denied.
12-12-83	Deft's prop addtl voir dire instructs. and prop jury instructs.
12-12-83	Deft's memo in suppt of prop jury instructions.
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12-15-83	FPTC. BBC. Apps: Vaudreuil for govt. Deft. w/ Atty Salzberg. Trial length: 2-3 days Discuss on voir dire and instructs.
12-16-83	FPTC ORDER.
12/19/83	JURY SEL & 1ST DAY. Jury panel selected & sworn. Jury List. Testimony.
12-20-83	2ND DAY J. TRIAL. Instructions, jury ret'd verdict of Guilty on each of 12 counts. Mo/JA-denied. 30 day PSI. Sentc'g set: 2/13/84, at 1:00 PM.
12-20-83	Verdict Form
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12-20-83	Deft's Memorandum in spt of Mo/JA.
12-20-83	Jury Instructions.

DATE	PROCEEDINGS
12/27/83	Deft's. Mo/Jdgmt of Acquittal or Alternative for New Trial.
12-29-83	Deft's mo for acquittal or, in altern, for a new trial is DENIED.
2/24/84	SENTENCING, BBC, apps: AUSA J. Vaudreuil, Atty Salzberg, deft. Ct 1: 90 days inpr, recommend work release not be granted. Cts 2 thru 12: Fined $50; ISS as to impr only & placed on proba for 4 yrs, to commence upon release fm confinement on Ct. 1. Fines payable w/in 6 mos of termination of proba. Sent. stayed pending Appeal.
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

vs.

WAYNE T. SCHMUCK,
Defendant.

INDICTMENT

[Filed Aug. 23, 1983]

18 U.S.C. §§ 1341 and 2

THE GRAND JURY CHARGES:

COUNTS ONE THROUGH TWELVE

1. At all times pertinent to this indictment, WAYNE T. SCHMUCK did business in the name of Big Foot Auto Sales, located in Harvard, Illinois.

2. From on or about July 1, 1979 and continuing until on or about July 30, 1980, the defendant,

WAYNE T. SCHMUCK

did devise and intend to devise a scheme to defraud persons in the State of Wisconsin (hereinafter referred to as "Wisconsin customers"), who would be and were induced to purchase automobiles from Wisconsin automobile dealers (hereinafter referred to as "Wisconsin dealers"), on which WAYNE T SCHMUCK had caused the odometer mileage reading to be altered so that the odometer indicated a mileage reading which was sub-

stantially less than the true and correct mileage for that automobile.

3. It was a part of this scheme that WAYNE T. SCHMUCK would and did in the course of his business purchase used automobiles from individuals and auto auctions in Illinois, Wisconsin, and elsewhere, for resale to various persons, including automobile dealers in Wisconsin.

4. It was further a part of the scheme that WAYNE T. SCHMUCK would cause the odometer mileage reading to be altered on many of the used automobiles which he intended for resale so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile.

5. It was further a part of the scheme that WAYNE T. SCHMUCK would and did prepare an odometer mileage statement for each of the automobiles referred to in paragraph 4 on which was entered the odometer mileage reading as WAYNE T. SCHMUCK had caused it to be altered.

6. It was further a part of the scheme that WAYNE T. SCHMUCK would offer these automobiles to purchasers at the used car lot of Big Foot Autos in Harvard, Illinois, including automobile dealers from the State of Wisconsin.

7. It was further a part of the scheme that Wisconsin dealers purchasing each automobile would and did pay WAYNE T. SCHMUCK for the automobile and that WAYNE T. SCHUMCK would and did provide each Wisconsin dealer with an original odometer mileage statement reflecting the mileage as WAYNE T. SCHMUCK had caused it to be altered.

8. It was further a part of the scheme that the Wisconsin dealers would offer these automobile in Wisconsin for sale to Wisconsin customers (or, in some instances, to other Wisconsin dealers,) and that the Wisconsin

dealers would and did prepare an odometer mileage statement for each of the automobiles on which was entered the mileage as it appeared on the automobile odometer, which, because WAYNE T. SCHMUCK had caused it to be altered, did not reflect the true and correct mileage for that automobile.

9. It was further a part of the scheme that in purchasing each of these automobiles, the Wisconsin dealers and the Wisconsin customers would and did rely on the false odometer mileage reading as it appeared on the automobile odometer and on the odometer mileage statements provided by WAYNE T. SCHMUCK and further that the Wisconsin dealers and Wisconsin customers would and did pay more for each automobile than would have been paid if the odometer mileage reading had not been altered.

10. It was further a part of the scheme that each Wisconsin dealer who purchased an automobile from WAYNE T. SCHMUCK would and did submit a Wisconsin title application form to the Wisconsin Department of Transportation, Bureau of Vehicle Registration and Licensing, in order to obtain a Wisconsin title in the name of the Wisconsin dealer or on behalf of and in the name of the Wisconsin customer.

11. On or about the dates set forth below, in the Western District of Wisconsin, the defendant,

WAYNE B. SCHMUCK,

for the purpose of executing this scheme, did cause to be delivered by mail according to the direction thereon, mail matter to be sent and delivered by the United States Postal Service, to the Wisconsin Department of Transportation, Bureau of Vehicle Registration and Licensing, 4802 Sheboygan Avenue, Madison, Wisconsin, from the Wisconsin dealer indicated, containing in each instance a Wisconsin title application form pertaining to a particular automobile described below:

Count	Approximate Date of Mailing	Wisconsin Dealer	Automobile Description and Serial Number
1.	July 25, 1979	Cameron Auto Sales 7-19 Received 7-21 Tranferred Cameron, Wisconsin	1973 Chevrolet 1Y17K3W156990
2.	September 26, 1979	Southside Auto 6-30 9-18 Cameron, Wisconsin	1977 Chevrolet CCL447J129679
3.	November 8, 1979	P and A Sales 11-7-79 8-1-80 Bloomer, Wisconsin	1977 Mercury 7274A602435
4.	February 18, 1980	Southside Auto 1-12-80 2-14-80 Cameron, Wisconsikn	1977 Chevrolet CKR247F325035
5.	February 27, 1980	Grass Motor Sales 2-7-80 2-23-80 Bloomington, Wisconsin	1977 Buick 4V69K7H514944
6.	March 21, 1980	P and A Sales 3-13-80 3-15-80 Bloomer, Wisconsin	1978 Ford 8P63H127461
7.	March 31, 1980	P and A Sales 2-27-80 3-24-80 Bloomer, Wisconsin	1973 Chevrolet CCY243J126096
8.	May 27, 1980	P and A Sales 4-19-80 5-19-80 Bloomer, Wisconsin	1975 Ford F10GLW04097
9.	May 5, 1980	P and A Sales 4-5-80 4-29-80 Bloomer, Wisconsin	1975 Ford 5G21H139390
10.	June 9, 1980	Hi Way Service Garage 3-24-80 6-5-80 Marshfield, Wisconsin	1975 Ford 5X11Y215161

Count	Approximate Date of Mailing	Wisconsin Dealer	Automobile Description and Serial Number
11.	June 27, 1980	Southside Auto 5-1-80 6-23-80 Cameron, Wisconsin	1977 Dodge NH45C7B100810
12.	July 2, 1980	Southside Auto 6-30-80 6-14-80 Cameron, Wisconsin	1977 Dodge NL41C7F292674

(All in violation of Title 18, United States Code, Sections 1341 and 2.)

A TRUE BILL

/s/ [Illegible]
Foreman

/s/ John R. Byrnes
JOHN R. BYRNES
United States Attorney

Indictment returned: 8/23/83.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WAYNE T. SCHMUCK,
Defendant.

STENOGRAPHIC TRANSCRIPT

of Final Pretrial Conference had to the Court in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable JAMES E. DOYLE, Judge, presiding, on Thursday, the 6th day of October, 1983, commencing at 2:00 p.m.

APPEARANCES

The plaintiff appeared by THOMAS D. SYKES, Assistant United States Attorney, Madison, Wisconsin.

The defendant, Wayne T. Schmuck, was present in person and by HARRY SALZBERG, Attorney at Law, Salzberg & Steinberg, 108 King Street, Madison, Wisconsin 53703.

* * * *

[4] THE COURT: I will provide then that the defendant's brief in support of the motion be served and filed by October 20th. The Government's answer be by October 27 and the defendant's reply by November 1.

Counsel, just one moment. It's possible that this is something that is familiar to both of you, counsel, but just in case it isn't, I want to mention that although I've been called in only for this specific temporary purpose and although I've examined the Indictment only very quickly in preparation for this conference, I note that it does resemble a number of Indictments that were returned in this court at various times in the past and specifically Indictments that were returned in several cases, perhaps—perhaps as long as about three years ago or so. All I want to do is to make sure that you are aware that at that time, about three years, maybe four years ago, similar Indictments were challenged very sharply and in particular it was contended, and I don't attempt to state the point with great precision, but it was contended that the mailings that are referred to and relied upon, which I think is a mailing—are mailings from the Wisconsin dealers to the Wisconsin Department of Transportation, are not fairly or lawfully to be attributed to the defendant in terms of criminal responsibility.

My recollection, and I'm doing this entirely from recollection without looking back at the records about this, [5] but my recollection is that the point was raised and disputed in a case that I administered and also in a case that Judge Crabb administered and that I wound up holding for the Government on the question and Judge Crabb held for the defendant on that question, I believe. One of those cases went to the Seventh Circuit and the Seventh Circuit held for the Government.

That's all. I just want to make you aware of that and I think it should be relatively easy to find the case.

MR. SALZBERG: Thank you, Your Honor. Yeah, I'm aware of the *Galloway* case which is the case that did go to the Seventh Circuit. However, I believe that our case can be distinguished from the *Galloway* case and I therefore would—I have submitted these motions after reading the *Galloway* case.

THE COURT: Thank you.

* * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Maureen Beilke
Official Court Reporter
4-6-84
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

v.

WAYNE T. SCHMUCK,
Defendant.

ORDER

Defendant has moved to dismiss the indictment against him on the ground that it fails to allege facts which would support a conviction under 18 U.S.C. § 1341.[1]

Defendant contends that the indictment is deficient in failing to set out specifically that the mailings which were alleged to be in furtherance of defendant's scheme did not endanger the success of defendant's scheme. Defendant argues that such an allegation is necessary in view of the holding of the United States Supreme Court in *United States v. Maze*, 414 U.S. 395 (1973), to the effect that mailings which actually enhance the probability of detection are not within the purview of the statute.

Defendant is correct in his understanding that a conviction could not stand if it were based upon mailings

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[1] Defendant has also moved to dismiss on the ground that the indictment fails to charge an offense under 18 U.S.C. § 1342. Since the indictment does not purport to charge an offense under this section but, rather, under §§ 1341 and *2*. I have not considered defendant's arguments in this regard.

that did not actually "further" the scheme to defraud. However, that is a matter to be determined at trial. The indictment is sufficient if it merely alleges that the mailings were caused by the defendant for the purpose of executing the scheme. The indictment in this case includes the requisite allegations.

ORDER

Defendant's motion to dismiss the indictment against him is DENIED.

Entered this 11th day of November, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK
Defendant.

DEFENDANT'S PROPOSED JURY INSTRUCTIONS

Comes now defendant Wayne T. Schmuck by and through his attorney, Harry E. Salzberg, and respectfully requests the Court to include the following instructions in the Court's charge to the Jury

* * * *

DEFENDANT'S PROPOSED INSTRUCTIONS
ON LESSER INCLUDED OFFENSE

The crime of mail fraud with which the defendant is charged in the indictment includes the lesser offense of odometer tampering.

If you find the defendant not guilty of the crime of mail fraud charged in the indictment or if you cannot unanimously agree that the defendant is guilty of that crime, then you must proceed to determine whether the defendant is guilty or not guilty of the lesser offense of odometer tampering.

Seventh Circuit instructions 2.03 (as modified)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK
Defendant.

MEMORANDUM IN SUPPORT OF PROPOSED JURY INSTRUCTIONS

1. DEFENDANT IS ENTITLED TO HIS INSTRUCTION ON THE LESSER INCLUDED OFFENSE

Defendant is charged in the indictment with 12 violations of 18 U.S.C. sec. 1341 (Mail Fraud). The indictment sets forth allegations of a scheme involving odometer tampering, which is prohibited under 15 U.S.C. sec. 1984;

> "No person shall . . . cause to be . . . reset or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon".
>
> Paragraph 4 of the indictment charges: "It was further a part of the scheme that WAYNE SCHMUCK would cause the odometer mileage reading to be altered on many of the used automobiles which he intended for resale so that the odometer indicated a mileage reading which was substantially less than the true and correct mileage for that automobile."

The defendant is entitled to an instruction on a lesser included offense where, on the facts of the case,

> "the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser—included offense,"

Sansone v. United States, 380 US 343, 13 L. Ed. 2d 882 (1965).

In *United States v. Stolarz*, 550 F. 2d 488 (CA 9 1977), cert. den. 434 U.S. 851, L. Ed. 2d 119, defendant was charged with assaulting a fellow prisoner with intent to do murder, contrary to 18 U.S.C. sec. 113(a).

Defendant was convicted, over his objection, of assault with a deadly weapon with intent to do bodily harm, contrary to 18 U.S.C. sec. 113(c). Although 18 U.S.C. sec. 113(c) requires use of a weapon, an element not included in the statutory definition of 18 U.S.C. sec. 113(a), the conviction was upheld, since the court found an inherent relationship between the offenses, see *United States v. Whitaker*, 447 F. 2d 134 (D.C. Cir. 1971), and the use of a deadly weapon (a Knife) was alleged in the indictment.

In *United States v. Pino*, 606 F. 2d 908 (CA 10 1979), the court reversed a conviction for involuntary manslaughter for failure to charge, as a lesser offense, careless driving. Although the involuntary manslaughter statute requires no proof of use of a vehicle, the Court looked to the facts of the offense, and the practical test of *Whitaker, supra.*

In *Whitaker, supra*, defendant was convicted of burglary, which does not require unauthorized entry, but does require intent to commit a crime within the building entered. The proof at trial was that Whitaker battered down the door of the house, which amounted to unlawful entry, against the occupant's will. The Court reversed, holding that on the facts an instruction on the lesser offense was required:

> "defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense,

Whitaker, supra 447 F. 2d 319

The Ninth Circuit has followed the inherent relationship test as recently as *United States v. Johnson*, 637 F. 2d 1224 (1980).

In *United States v. Stavros*, 597 F. 2d 108 (1979), a wagering tax conviction, the Seventh Circuit considered what constituted a lesser included offense so as to bar on double jeopardy grounds conviction for both a greater and a lesser offense.

The Court noted that:

> "When a statute can be violated in different ways we must look to the facts alleged in the indictment to determine what constitutes a lesser included offense,"

Stavros, supra 597 F. 2d at 112.

Since the offense of odometer tampering must necessarily be proved in order to sustain the charge of mail fraud in this case, the lesser included offense instruction is appropriate.

2. DEFENDANT IS ENTITLED TO HIS INSTRUCTION ON THE ISSUES IN THE CASE

Defendant is entitled to an instruction on the issues in the case which informs the jury that the mailings alleged to constitute mail fraud must have been done in execu-

tion of, and furtherance of, the fraudulent scheme. *United States v. Maze*, 414 U.S. 395, 38L, Ed. 2d, 603 (1974), establishes that there must be a sufficient connection between the mailings and the accomplishment of the fraudulent scheme;

> "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this: instead, it required that the use of the mails be "for the purpose of executing such scheme or artiface. . . ."

Maze, supra, at 414 U.S. 405.

In Maze, the mailings were one step in the eventual uncovering of the fraud. Likewise, in *U.S. v. Galloway*, 664 F. 2d. 161 (CA 7 1981), the Court analyzed the facts to determine if the mailings were in execution of and furtherance of, the scheme. In reinstating Galloway's conviction, the Court found, on the facts,

> "these mailings were thus *more* than "normal concomitants" of an essential transaction, they were an integral part of that transaction. They were essential to executing the scheme to defraud,"

Galloway, supra, at p. 163

and:

> "Certainly the mailings were no *counterproductive* to the scheme, as were the mailings in Maze," ld. at 164.

The question of the utility of the mailings to the scheme is in essense a question of fact for the jury.

3. DEFENDANT IS ENTITLED TO AN INSTRUCTION ON THE THEORY OF HIS DEFENSE INSTRUCTION

Whether or not the offense of odometer tampering is considered a lesser included offense, the defendant is en-

titled to have the jury informed of his theory of the defense, that is, that the government has charged him with a crime he did not commit, rather than the crime he did commit. The general rule is that the defendant is entitled to an instruction on any theory of defense which is supported by some evidence, however slight, see *Devitt & Blackmar*, sec. 13.07, citing *United States v. Lehman*, 468 F. 2d 93 (CA 7 1972), cert. den. 409 U.S. 967.

Dated: ————.

Respectfully Submitted,

/s/ Harry Salzberg
HARRY SALZBERG
Attorney for Wayne Schmuck
108 King Street
Madison, WI 53703
(608) 256-4771

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

———

Case No. 83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WAYNE T. SCHMUCK,
Defendant.

———

STENOGRAPHIC TRANSCRIPT

of proceedings had upon Final Pre-Trial Conference to the Court in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable BARBARA B. CRABB, Judge, presiding, on Thursday, the 15th day of December, 1983, commencing at 1 p.m.

[2] APPEARANCES

JOHN W. VAUDREUIL, Assistant United States Attorney, 215 Monona Avenue, Madison, WI 53701, appeared on behalf of the Plaintiff.

HARRY E. SALZBERG, 108 King Street, Madison, WI 53703, appeared on behalf of the Defendant.

ALSO PRESENT

WAYNE T. SCHMUCK, Defendant.
ATTORNEY PETER STEINBERG

* * * *

PROCEEDINGS

(Whereupon, proceedings in the above-entitled criminal action commenced in open court as follows:)

* * * *

[4] THE COURT: Let me see. Are you saying that the only factual matter that you're going to contest is—let me start again. You're saying the only matter you plan to contest is whether the mailings sent to the Wisconsin Department of Transportation constituted a mailing in furtherance of the crime?

MR. SALZBERG: Well, the main factor we are going to be contesting is whether those mailings constituted mail fraud. We would not be contesting the odometer tampering scheme itself but only whether the odometer tampering scheme constituted mail fraud.

THE COURT: Well, Mr. Salzberg, you're probably aware that that point has been quite conclusively resolved in a case where that was the only issue in *United States v. Galloway*. The Court of Appeals reversed my decision in which I said I didn't think that mailings that were sent in the normal course of business to register cars constituted part of a scheme to defraud, and the Seventh Circuit said quite clearly they did.

MR. SALZBERG: Yes, Your Honor, we are very well aware of that case. We have gone through it quite closely, and we feel that we can distinguish our case from that case; and we can show that the mailings in this case were counterproductive to the scheme and, therefore, could not be in furtherance of this scheme based on certain distinctions in our case. [5] Nonetheless, we do feel it is a matter for the jury to decide whether in fact the mailings furthered the schemes, and we don't believe that *Galloway* stands for the proposition that the jury should not decide whether the mailings furthered the schemes.

THE COURT: Well, as far as whether or not the—well, let's talk about how this is going to go forward. If you're not intending to contest anything but the mailings

and what the mailings were for, is it necessary for Mr. Vaudreuil to go through all of the other evidence that he would be otherwise putting on?

MR. SALZBERG: Mr. Vaudreuil and I have stipulated to certain matters already in order to try to shorten the trial.

* * * *

[11] THE COURT: So, I guess, Mr. Vaudreuil, that it boils down to this: That you think it's a matter of law that the mailings to the Wisconsin Department of Motor Vehicles furthered the scheme, and Mr. Salzberg thinks that that's something that the jury should be left to decide.

MR. VAUDREUIL: I think that boils it down, that's right.

THE COURT: Okay.

MR. VAUDREUIL: Does the Court want me to speak to this at this time or—

THE COURT: Yes, why don't you.

MR. VAUDREUIL: And that I guess goes to the government's requested Instruction No. 6. I would certainly concede, as the instruction points out, that whether mailings occurred, and basically that's for the jury to decide, but I think in this case that this mail fraud case, we're in probably a position that may be unique to mail fraud cases in that mail fraud generally is or each one is almost a being unto itself. And whatever the mailings are like are perhaps different, and it may be more of a jury question. But in this situation it seems that basically the identical case to *Galloway*. Actually I think the facts here in terms of the mailings being in furtherance and being caused by the defendant would be more closely [12] aligned, because the absence as the proof will show, the cars didn't go through the Chicago Auto Auction and those various things. They were basically sold by Mr. Schmuck to a Wisconsin dealer, who sold them to a guy on the street; and the dealer mailed in the title, all within a fairly short period of time.

So, the reason that I think, as I have drafted it, is that if the jury finds that that scheme to defraud occurred, the rollbacks, and I guess there's or there isn't going to be much of a dispute there, and they find those dealers then sent those documents to the Department of Motor Vehicles, to allow the jury to in a sense decide whether or not they're in furtherance or not in furtherance without—well, it is to basically allow them to decide in contradiction to what the Seventh Circuit has said is the law on this kind of a case in these mailings.

It seems to me that these mailings or that the Court, and perhaps my instruction could be improved upon in terms of wording. But to instruct the jury they must find or that if they find certain underlying facts, basically the facts as I see that they would come out, and as I guess they came out in *Galloway*, then the Seventh Circuit has held that those are in furtherance of a scheme to defraud of this type. And I think that's—since the law is clear, we have to give the jury an instruction, give them guidance. And I think basically the Court does not take the issue from the jury. If they don't find those facts, [13] then they don't go on to find any furtherance, obviously.

THE COURT: It would probably be necessary, if we were to use your Request No. 6, to add that the jury has to find that it was reasonably foreseeable that Mr. Schmuck would know that the documents would be mailed in.

MR. VAUDREUIL: I think that's correct, Your Honor, because I think that's the language that comes from *Galloway* and that I actually—what?—18 lines ahead put in there by saying that or in the initial Instruction No. 4 I think I have given the jury a finding. I guess that the odometers were altered and that Mr. Schmuck knew they were; that he sold them and that he was or that it was reasonably foreseeable that the documents would be mailed, and the documents were then mailed. I think it is a matter of law that they have to be told that that is in furtherance.

THE COURT: Mr. Salzberg, I will hear you on that.

MR. SALZBERG: We would take issue. We would take serious issue with that instruction, Your Honor. First of all, we feel that the *Galloway* case did not, when this Court or when the Seventh Circuit overturned this Court's directed verdicts in this case, it simply ruled that the jury in that particular case had enough evidence to find that the mailings furthered the scheme.

The *Galloway* case did not rule that as a matter of law whenever there's a fraud, a scheme to defraud and then a mailing, [14] that the mailings furthered the scheme. And we would direct the Court's attention, as I have in my brief on the indictment, to Footnote 7 of the *Galloway* case itself, where the Court said, that the Court noted that no, quote, nowhere on the title documents were odometer readings required. "Such a requirement, of course, might have made detection of the scheme more likely." And we assume it would have taken or it would have made the scheme more—it would have meant that the mailings were not in furtherance of the scheme, because it would have caused the likelihood of detection.

In our case the odometer readings are included on the title applications, and we feel this distinguishes our case from the *Galloway* case. And, therefore, it is still a matter of fact for the Jury as to whether the mailings furthered the scheme.

THE COURT: Do you have a copy of *Galloway* with you?

MR. SALZBERG: Yes, Your Honor.

MR. VAUDREUIL: I have an extra. I have got an extra copy, Your Honor,—

THE COURT: Thank you.

MR. VAUDREUIL: —which John Byrnes requires me to keep around at all times.

MR. SALZBERG: Your Honor, could I direct your attention, while you are reading the case, to the opening on the first page there, which states that, Following a jury verdict [15] of guilty, the trial court directed a

verdict for the defendant. The Court said: Because we find that the jury properly could have found that this scheme falls within the strictures of the federal statute, we reversed the trial court's ruling. And when Your Honor is ready, I would like to direct your attention to one other aspect.

THE COURT: I am not quite ready, thank you. I wanted to re-read Note 7. All right, Mr. Salzberg.

MR. SALZBERG: Your Honor, also the *Galloway* Court states that the *Maze* Court or the United States Supreme Court, and this is on the—I guess it's the third page of the *Galloway* decision. I don't have the page number on my copy. Okay. Excuse me. Fifth page under Section C where it discusses the *Maze* case. You see that paragraph starts, "The Court emphasized that the statute, although it has been read broadly," you see that paragraph?

THE COURT: Right.

MR. SALZBERG: At the end of that paragraph the Court states, "Indeed, the Court emphasized, these mailings endangered the scheme by furthering the likelihood of detection. "Given this fact, the mailings could not fairly be said to have been in furtherance of the scheme."

And then the Footnote 7 that I referred to earlier, we believe that given this or given this statement by the Court, it is still a matter of or still a matter for the Jury to decide [16] as to whether the mailings were in furtherance of the fraudulent scheme. It would be erroneous for the Court to take that matter out of the hands of the Jury.

THE COURT: Mr. Vaudreuil, do you want to add anything?

MR. VAUDREUIL: Not really, Your Honor. I have nothing to add.

THE COURT: My recollection, although I haven't checked this, is that in *Galloway* that was part of the jury's finding. That is, whether the mailings furthered the scheme to defraud. I am going to leave it up to the

Jury to determine whether or not the mailing did further the scheme. So, probably I'll have to revise Government Request No. 6. I'm not sure that I want to break this down into four sections the way that the defendant has suggested.

* * * *

[18] THE COURT: Okay, good. All right. Anything else?

MR. VAUDREUIL: Yes, Your Honor.

THE COURT: Yes.

MR. VAUDREUIL: Well, I think it would be appropriate, and I guess maybe when we were on the instructions I could have brought it up, to include at least the lesser-included offense request.

THE COURT: Thank you. And I meant to do it, and I forgot about it. Mr. Salzberg, I wasn't sure that I understood your point about the lesser-included offense.

MR. SALZBERG: We had to brief the point, Your Honor. What we were trying to bring out is that the Seventh Circuit decision in the *United States v. Stavros* that we have cited that's 597 F.2d 108, we would request that the Court follow that decision, which states that when a statute can be violated in different ways, we must look to the facts alleged in the indictment to determine how we would reach a lesser-included offense. We would go through from there to saying that since the offense of odometer tampering must necessarily be proved in this case in order to sustain a charge of mail fraud, given [19] the wording of the indictment, that the lesser-included offense of odometer tampering is appropriate in this case.

THE COURT: Mr. Vaudreuil, do you wish to comment on that?

MR. VAUDREUIL: Yes, Your Honor. I don't think this is an appropriate case for that lesser-included instruction being given. I think that the test for a lesser-included is set out in Mr. Salzberg's brief, and I think it is set out in a little more detail. Well, I guess they

quote in detail the *Whitaker* case and the *Bauer*, I guess it is Page 12 or whatnot of *Bauer's Instructions;* and they talk about it and what needs to be present before a lesser-included would be given.

And the first one or one of the first comments they make is that it is not necessarily clear that the *Whitaker* approach of more of a practical approach, rather than a more mechanical comparing of the elements, whichever one is necessarily favored. So I don't think that's necessarily decided.

But going on to the requirements that must be present, there must be this identity of elements; and I don't think that's present here, first of all. I think if the proof came out or if the proof were that Mr. Schmuck had participated in the scheme to defraud by not causing the rollbacks but by buying a car or taking a car knowing it had been rolled back and still selling it in his scheme, I think it would be sufficient to convict. We may end up or we would maybe end up with [20] a discussion about whether he was on proper notice or whatever. I don't anticipate that being the evidence, I should state. In fact, I don't think it will be.

But the element in a mail fraud, being the scheme to defraud in this case, it being charged in one fashion, but I don't think necessarily you—you wouldn't necessarily have to prove that he had—either that he had committed a lesser-included or the tampering crime. But I think more strongly arguing against giving it is the requirement that the additional element in the greater crime or the requirement that that be in dispute and really in dispute. I would cite the case of *United States v. Busic.* That is B-u-s-i-c. 592 F.2d, Page 13. It is a '78 Second Circuit case where they discussed lesser included and specifically discussed this, how much the element has to be in dispute. And they said the following, "Thus a defendant is not entitled to a lesser-offense charge merely because he formally contests elements of the greater charge which distinguish it from the lesser. The contest

must be real. He must produce enough evidence to justify a reasonable juror in concluding that he committed the lesser offense but did not commit the greater offense." And they go on to talk about lesser offense charge not being available, on the ground that that would just allow him to plead for mercy, which I think we would all agree to. In this case there doesn't seem to be any dispute that there was a scheme to defraud. The [21] question, I guess, would be regarding or relating to mailings. I don't think there will be any serious dispute that the mailing occurred, and I guess that the argument will be at least some argument that as to whether these were actually furthering the scheme.

Now, I think that—I don't think there's really that much dispute on that, given that I don't think there will be much or I don't think there will be much of a dispute factually; and I think the defendant in a sense has stated that in his requested theory of defense instruction. He states, well, that his—he has pleaded not guilty, and this plea puts an issue in each of the four elements. I think that's the type of formality of putting something in issue that *Busic* was talking about, and I think here to instruct the Jury on the lesser included would violate that principle. Basically it would allow the jury to just decide which charge they like better. I know that it's the defendant's position, and not something they could articulate at trial, that the executor, being our office, should have charged the tampering and not in a mail fraud, since it's been determined that's a proper charge. It is the executive decision. And I think to give a lesser included put in this case on these facts, puts the jury in the position of deciding which charge they like better. And when you get to that, you always get—it seems to me at least that you always get to the point of a basic or basically being [22] a sympathy plea or not, which would whether it is articulated or not, and I don't think that's proper and I don't think the jury can be in that position properly, and I guess for those reasons I don't

think the lesser-included offense charge here is appropriate.

THE COURT: I agree, and I would not give one on the facts of the charge in this case. Also, about the theory of the defense instruction, I would not give it in the form that you have got it. I don't consider that that's a defense. I don't think it is up to the jury to make a decision whether the government properly charged the defendant with a crime. The jury's decision is to decide whether the government's proved the elements of the crime charged. That is, that charged your client with, and not to decide whether the government charged him with the proper crime. If the government or if they find the government didn't prove the elements, they can acquit the defendant. If they find that the government did prove the elements, then they can find him guilty. But that's the extent of their role.

* * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kathleen Banks
Official Court Reporter
3-23-84

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

v.

WAYNE T. SCHMUCK,
Defendant.

FINAL PRETRIAL CONFERENCE ORDER

A final pretrial conference was held in this case on December 15, 1983, before United States District Judge Barbara B. Crabb. Plaintiff appeared by John Vaudreuil. Defendant appeared in person and by counsel, Harry Saltzburg. Also present was Peter Steinberg.

Counsel agreed to the voir dire questions in the form given to counsel at the conference.

Defendant's motion for the giving of an instruction on a lesser included offense was denied. Defendant's motion to let the jury decide whether the mailings in this case further the offense was granted. Defendant's motion to give his requested theory of defense instruction was denied on the ground that the proposed instruction did not incorporate a theory of defense.

Defendant noted that he opposed the government's request for the giving of an instruction on either joint venture or aiding and abetting and that he opposed the giving of an instruction on disagreement among jurors. A decision on the giving of an instruction either on joint

venture or aiding and abetting was reserved until the close of evidence in the trial. The defendant's objection to the giving of the instruction on disagreement among jurors was overruled.

Entered this 16th day of December, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 83-CR-56-C

UNITED STATES OF AMERICA,
Plaintiff,

vs.

WAYNE T. SCHMUCK,
Defendant.

STENOGRAPHIC TRANSCRIPT

of proceedings had upon Jury Trial in the above-entitled criminal action in said court, sitting in the City of Madison, in said Western District and State of Wisconsin, the Honorable BARBARA B. CRABB, Judge, presiding, on Monday and Tuesday, the 19th and 20th days of December, 1983, commencing at 9:00 a.m. and 9:10 a.m., respectively.

APPEARANCES

The plaintiff appeared by JOHN W. VAUDREUIL, Assistant United States Attorney, Madison, Wisconsin.

The defendant, Wayne T. Schmuck, was present in person and by HARRY SALZBERG and PETER L. STEINBERG, Attorneys at Law, Salzberg & Steinberg, 108 King Street, Madison, Wisconsin.

• • • •

[113] THE COURT: All right. I will excuse the jurors for a few minutes. I'll send you back up to the jury room.

(Whereupon, the Jury was excused at 9:37 a.m.)

THE COURT: Mr. Salzberg.

MR. SALZBERG: Your Honor, I have here a motion for acquittal, a judgment of acquittal at the close of the

Government's case under Federal Rule 29(a). I briefed the motion and I'd like to present my brief to you, as well as a copy to the United States Attorney.

THE COURT: All right. Thank you. You can just hand it to the clerk. It might be easier.

Mr. Salzberg, I've had an opportunity to read your memorandum in support of your motion for judgment of acquittal and I will deny the motion. I understand the point that you are making and I'm familiar with the cases that you've cited. [114] I believe that it is not as clear as you indicate. That in *Galloway*, the Court of Appeals indicated there might be a different view of the situation were the title documents to require odometer readings. That was dicta in that case and I think it was an aside that the court made which does not mean that if odometers were required, the title documents would therefore be counterproductive to the scheme.

I think that the title documents have to be analyzed as the documents—that they were in fact analyzed in terms of what they did convey to the Department of Motor Vehicles.

I think it's—it's not at all clear that the title documents that do require odometer readings were counterproductive to the scheme because all that they showed was the odometer reading at the time the car was sold. They did not indicate a previous odometer reading which might have indicated that there had been a rollback or the possibility of a rollback.

This is still a matter that the Jury can decide. I believe a reasonable Jury could find it reasonable that under the view taken under the law in the *Galloway* case, the mailings in this case were in furtherance of the scheme to defraud.

MR. SALZBERG: Your Honor, one further ground for the motion for directed verdict which I haven't included in my brief and that is an issue of due process here. That my [115] client is entitled to notice of all conduct that's made criminal by the statute and on the

facts presented by the Government on this case, the statute covers such a wide range of activities that it would be impossible to determine what activity would be illegal and the statute, if it's applied to this case, I would say violates my client's due process right to notice that his conduct falls within the prohibitions of this statute, if the Government is applying the statute in the way that would deprive my client of what really is illegal.

THE COURT: The Government is applying the statute? Is that what you're saying?

MR. SALZBERG: Is enforcing the statute.

THE COURT: And what's the rest of your argument? In such a way that—

MR. SALZBERG: In such a way that an individual defendant would not know what conduct is illegal.

THE COURT: And you're saying that's because of the mailings to the State Department of Motor Vehicles?

MR. SALZBERG: Because—Well, I'm saying that because the—It's really hard to tell what conduct would be. The results of a mailing the Government will state really is furthering a mail fraud scheme under the statute and it's really unclear what the next case is going to be that the Government is saying is mail fraud under the statute.

[116] THE COURT: The motion will be denied on that ground as well. I don't think that it is so unclear to a defendant of the conduct that he would be charged with as to make it a violation of his due process rights. If the defendant could reasonably foresee that a mailing would take place, then he could be charged and convicted under the statute, assuming that the other elements are in that. The Jury could decide whether in this instance Mr. Schmuck could reasonably have foreseen that a mailing could have taken place.

Anything further before the jurors are brought down?

MR. VAUDREUIL: No, Your Honor.

THE COURT: And, Mr. Salzberg, your witnesses are here and ready to go?

MR. SALZBERG: Yes, Your Honor. There's only one witness.

THE COURT: Okay. Call the jurors, please.

MR. STEINBERG: Your Honor, I'll go get our witness.

THE COURT: Okay, fine.

(Whereupon, the proceedings were recommended in the presence of the Jury at 10:35 a.m., as follows:)

THE COURT: We are now beginning the defendant's case. Mr. Salzberg, you may begin by calling your first witness.

[117] MR. SALZBERG: I'd like to call my first witness, Mr. James Peterson.

THE COURT: Mr. Peterson, would you come forward, please?

JAMES PETERSON,

called as a witness by the defendant herein, having been first duly sworn, was interrogated and testified as follows:

DIRECT EXAMINATION

BY MR. SALZBERG:

Q Could you please state your name and spell it for the reporter?

A James Peterson. It's with an O-N.

Q And where do you live, Mr. Peterson?

A Cross Plains, Wisconsin.

Q And how are you employed?

A I'm employed by the Department of Transportation.

Q And how long have you had your present position with the Department of Transportation?

A About eleven years.

Q And could you briefly describe your duties in that position?

A Basically investigate complaints against motor vehicle dealers.

Q And do part of your duties relate to the detection and [118] investigation over odometer tampering?

A Yes.

Q And are you familiar with vehicle registration procedures in Wisconsin?

A Yes.

Q And are you familiar with the various forms that are required for registering a vehicle and changing a title on a motor vehicle in Wisconsin?

A Yes.

Q And does the information which is supposed to be reported on the forms a person uses to transfer a title in Wisconsin include the odometer reading of the car when it is transferred?

MR. VAUDREUIL: Your Honor, I'll object. I think —I think the evidence will be clear that it's changed considerably since 1979, 1980. Unless we's confining ourselves to that time period, I don't think it's really relevant.

THE COURT: All right. Would you confine your question to the period that is at issue in this case?

BY MR. SALZBERG:

Q Yes, Your Honor. Is there a place on the form to require the odometer mileage?

THE COURT: Which forms are you talking about? As they exist now or as they were in 1979?

[119] BY MR. SALZBERG:

Q The forms that were in use in 1979 and 1980?

A In '79 there was a place for an odometer reading on the Certificate of Title and also on a—a dealer reassignment form.

Q Thank you. And, do you know what the purpose in having the odometer reading on the forms w:s at that time?

A It was—On the title it was merely an indication to the purchaser what the mileage was. It was not a formal mileage statement.

Q And was one purpose of the requirement to—Was one purpose of the space for the odometer reading to help control odometer tampering?

A I don't know what their purpose was at that time when they put the space for the mileage on the title.

Q How long has there been the space on the forms to report the odometer reading?

A What form would you be referring to?

Q Any of the forms?

A The dealer reassignment form was changed about ten years ago to conform with the federal disclosure requirement and shortly after that, a space was provided on the Wisconsin title for mileage and later changed to include the formal disclosure statement.

Q And how long has it been a requirement in Wisconsin that [120] the odometer figure be reported when title is transferred on a vehicle?

A I think what you're asking is when was it necessary for any seller to give an odometer statement along with the applications and that—if that's your question, that would be September 1983.

Q Thank you. And does the Department of Transportation use computers to check for discrepancies in odometer statements?

THE COURT: Are you speaking of now or in 1979, '80?

MR. SALZBERG: Presently, Your Honor. Presently.

MR. VAUDREUIL: Then I'd object to relevancy, I don't think it makes any difference.

THE COURT: Sustained.

BY MR. SALZBERG:

Q How long have you investigated odometer tampering as part of your job duties?

A It would be shortly after the federal law was enacted. Nine or ten years I guess.

Q Thank you. And how significant is it in investigating odometer tampering to know the odometer reading of the car at various times during—various times during the use of the car?

A Well, anytime that you see odometer mileage on any form or statement, it helps in the investigation.

Q So knowing the odometer reading of the car at various [121] times in its history does assist in an odometer tampering investigation?

A Yes.

Q And isn't it critical to the investigation to know what the odometer reading was at various times in the car's history?

A Yes.

Q Now, do you know who investigated this case for the Department of Transportation?

A What particular phase of the investigation?

Q I was referring to the case against my client, Wayne T. Schmuck, who's present.

A The files were turned over to an investigator by the name of Ellswortl. Brooks who at the time lived in Tomah.

Q Thank you. And, is Mr. Brooks still working for the Department of Motor Vehicles?

A No. He is retired on a disability situation.

Q And do you know where Mr. Brooks is living at the present time?

A He's living in Tomah, Wisconsin.

Q And are you familiar from your duties with Mr. Brooks' investigation in this case?

A Yes.

Q And did Mr. Brooks use the Department of Transportation records to obtain the addresses of the owners of the cars [122] before Mr. Schmuck?

A Yes.

Q And what information did Mr. Brooks get from the prior owners? Did he get the—Well, I'll let you answer that one first.

MR. VAUDREUIL: I'm going to object, Your Honor.

THE COURT: As to what ground?

MR. VAUDREUIL: As to hearsay if he's going to be testifying as to what somebody might have said. I'm not sure what the question means, what he's getting at, but it might be calling for hearsay.

MR. SALZBERG: I'm not asking what Mr. Brooks said, Your Honor. I'm asking about the specific procedures of the odometer tampering investigation against my client.

THE COURT: Well, unless you ask them in a way that Mr. Peterson can answer of his own personal knowledge, it would be hearsay.

BY MR. SALZBERG:

Q Did Mr. Brooks obtain the prior odometer readings from the prior owners of the vehicles to your knowledge?

A Yes.

Q If Mr. Schmuck had sold these cars in Illinois instead of Wisconsin, would the Illinois title records contain any information about the odometer reading to your knowledge?

A At that time I don't believe that Illinois was recording [123] any odometer's mileage on their titles or required any statements to be given on the transfer of titles.

Q Thank you. Now even if the odometer figure isn't in the records, the odometer figure itself, aren't the records helpful to an investigation if they have the names and addresses of the previous owners on them?

A Yes.

Q Thank you. I have no further questions, Your Honor.

THE COURT: Mr. Vaudreuil, any cross-examination?

MR. VAUDREUIL: Yes, ma'am.

CROSS-EXAMINATION

BY MR. VAUDREUIL:

Q Mr. Peterson, you stated that you are familiar with the investigation of Mr. Schmuck as it began and came to a conclusion. Did that investigation start with a review of the Department of Motor Vehicles' records which tipped you off to some sort of fraud?

A No.

Q Isn't it a fact that that investigation started totally separate from any review of the records as a tip-off?

A Yes.

Q And how did it start?

A It started when we received complaints from individuals who had purchased cars which they had suspected of being tampered with.

[124] Q And once you received those complaints—Excuse me. What steps were then taken to see if there was an investigation, or anything should be done?

A We checked out the vehicle histories on those cars which led us to Illinois and then to the seller, Big Foot Auto Sales in Harvard, Illinois.

Q And was there anything particular about the number of titles you had in the Department of Motor Vehicles in the name of Big Foot that led you to think this might be something worth investigating?

A There was a large number of titles that they had applied for.

Q Now, isn't it a fact, Mr. Peterson, that if in fact just at random somebody had pulled the twelve title histories in this case, without any other knowledge, any other complaints, that nothing in those documents would tip off any fraud?

A No. There was—There was nothing in those files that would indicate any odometer tampering.

Q Because in fact in the occasions of those twelve where the title in Wisconsin was transmitted with an

odometer reading filled in, that would be the only—that is the only odometer reading in that car's history in Wisconsin, isn't it?

A Yes.

[125] Q How many cars, if you can estimate, Mr. Peterson, are titled by you folks in one year in Wisconsin

A Hundreds of thousands.

Q So in fact if the Department of Motor Vehicles were so inclined, it would be a night-and-day job probably to have somebody actually checking each of those title histories as a car comes in?

A Yes, sir.

Q And in fact, Mr. Peterson, isn't it correct, if somebody did do that and had done that for these twelve and the other hundreds of thousands, that those title histories wouldn't show any fraud by and large in almost every instance because they would be just like these twelve?

A That's true.

Q Now in terms of the necessity for these title documents to be obtained, in your experience and with your knowledge, isn't it correct that it's an absolute legal necessity to obtain title to your car when you purchase it and also it's a legal necessity for the title—excuse me—for the seller to give you a good title to that car?

A Yes.

MR. SALZBERG: Objection, Your Honor. I would say that's beyond the scope of the direct examination.

THE COURT: Overruled.

BY MR. VAUDREUIL:

[126] Q In fact, Mr. Peterson, isn't it correct that unless a person is inclined to violate the law, you couldn't drive a car without a title?

A That's right.

Q And in your experience in dealing with dealers' and customer complaints, isn't it in fact correct that if a dealer were to sell an automobile to a retail purchaser

and then not be able to provide title, that it's entirely likely that the purchaser would go back and get his money back and the dealer would look to get the car back to whoever he bought it from because he couldn't pass title?

A Yes.

Q Now, Mr. Peterson, assuming a person bought a car and had some suspicion that the mileage wasn't correct and did a personal check of the Department of Motor Vehicle records or asked you to check, isn't it in fact correct that checking those records again and, for example, and these twelve cars would not have revealed any fraud?

A That's correct.

Q And, in fact—well, strike that. Mr. Peterson, in your experience, what's the—maybe a percentage is putting it too fine, but in your estimation, how many Wisconsin automobile dealers use the mails in terms of their—at that time period used the mails for mailing in title documents?

A I would estimate more than half.

[127] Q And for dealers from the outlying parts of the state, northwestern Wisconsin, for example, would that percentage increase the further away you get from Madison?

A Yes, it would.

Q And is it your experience that a person who had a Wisconsin dealership would be aware that that's the common business practice?

A Yes.

Q I don't have any further questions.

THE COURT: Any redirect?

MR. SALZBERG: Yes. I have one question, Your Honor.

REDIRECT EXAMINATION

BY MR. SALZBERG:

Q Do you presently use computers to check for odometer tampering at the Department of Motor Vehicles now,

to check the large volume of cars? Given that you've said that you have a large volume of cars that are registered every year, do you use computers to check for odometer tampering when the need arises?

A Yes, we do now since we required the odometer mileage to be printed on the face of the Wisconsin title since September 12th of '83.

THE COURT: Since—

MR. SALZBERG: Thank you. I have no further [128] questions.

THE COURT: Since September 12th or December 12th?

THE WITNESS: September 12th.

MR. SALZBERG: Thank you. I have no further questions.

THE COURT: Mr. Vaudreuil, anything else?

MR. VAUDREUIL: Nothing. Thank you.

THE COURT: You may step down.

(Witness Peterson excused.)

MR. SALZBERG: The defense rests, Your Honor.

THE COURT: Mr. Vaudreuil, do you have any rebuttal?

MR. VAUDREUIL: No, Your Honor.

THE COURT: All right. Then I'll excuse the jurors for a short while while we have our instruction conference and I'll go back and get the materials for the instruction conference and be out in a few minutes. Court will recess for ten minutes.

• • • •

[132] MR. SALZBERG: There's one confusion here, Your Honor. I'm not sure which of the instructions you're referring to as the suggestions for instructions by the Government.

THE COURT: All right. It's the one that starts out, "In order to establish that Wayne T. Schmuck is guilty of . . ."

MR. SALZBERG: Yes. Okay.

THE COURT: Okay, and it's three pages long.

MR. SALZBERG: And it ends then with the United States Attorney's desire to have the instruction say that if you find that the—"If you further find that documents relating to these automobiles were thereafter mailed by the Wisconsin automobile dealers to the Wisconsin Department of Motor Vehicles, I instruct you, as a matter of law, that those mailings were in furtherance of the scheme to defraud."

THE COURT: Right.

MR. SALZBERG: Right. Okay. We would again voice our objection to the United States Attorney's instruction by saying that it is attempting to negate an important element of the offense.

THE COURT: I didn't mean to. That was a mistake on my part. The matter of law part should have been deleted. I would change that around.

[133] In order—That would be a new paragraph. In order to find the defendant guilty, you must find —This would be my proposal on that third page. In order to find the defendant guilty, you must find the defendant sold the automobiles described in the Indictment, knowing the odometers to have been altered, and that it was reasonably foreseeable that the documents would be mailed to the Department of Motor Vehicles and that documents relating to these automobiles were thereafter mailed by the Wisconsin automobile dealers to the Wisconsin Department of Motor Vehicles, and then there would be the last paragraph. The burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged.

I would also add, each separate use of the mails in furtherance of the scheme to defraud constitutes a separate offense.

MR. SALZBERG: Your Honor, between the two proposals, we would prefer the one that's written out on Pages—from the *Galloway* case, written out on what's marked as Pages 108 and the prior acts described on those pages. Howeyer, we state—we feel that our modi-

fied—what we call our modified proposed instruction we just submitted better states the elements of the offense and we think it's essential to have in the instructions that the defendant is not on trial for the offense of odometer [134] tampering because the Jury has heard so much evidence about the odometer tampering that we're afraid there may be an issue of prejudice and the Jury may very well convict my client of mail fraud because they find he's guilty of odometer tampering and they are two separate offenses and we feel it's very, very important that the Jury realize and then be instructed by the Court that my client is not on trial for odometer tampering and we also feel it's important that the Jury be instructed that they must find—

THE COURT: What about inserting on Page 109, after Line 18, the line, "The defendant is not on trial for the offense of odometer tampering," and then say—

MR. VAUDREUIL: Your Honor, may I be heard on that before it's finally decided?

THE COURT: Oh, sure. I'm just writing it down so I remember.

MR. VAUDREUIL: That would be after Line 18 on Page 109?

THE COURT: Right. All right. Mr. Vaudreuil, I'd like to hear what you have to say on whether the *Galloway* instruction or the Schmuck instruction should be used in this case and I'll refer to them that way just—

MR. VAUDREUIL: The Schmuck being—

THE COURT: The Schmuck being what you proposed in this case.

[135] MR. VAUDREUIL: Okay. I think actually I prefer the *Galloway*. What I was relying on was the Government's submission in *Galloway* and I think the Court effectively pared it down there and I think it would be more effective given the way the court gave it in *Galloway*. However, I would request—let me see—on Page 109 at the conclusion of—at Line 15. That's identical to what the Government submitted in the Schmuck in-

struction. It's—The second page at least, the way I have, with the deletion of it, it's not necessary for the Government to prove that, with the typo, Wayne T. Schmuck actually mailed the items is sufficient.

I think we can go on to say—I would just request that that—those two sentences be included there so that paragraph would—the third full paragraph on Page 109 where it ends up, the alleged fraud, at Line 15, would then go on to say, it is not necessary for the Government to prove that Wayne T. Schmuck actually mailed the items described. It's sufficient, if it's proved, that it's reasonably foreseeable that the mail be used in the course of the business transaction.

THE COURT: Well, look down at the paragraph at the beginning of Page 19 and see if that satisfies you.

MR. VAUDREUIL: Okay. I think—I think that will be okay. I think that will probably do it.

[136] THE COURT: What about the insertion of these two lines: The defendant is not on trial for the offense of odometer tampering. He's on trial for the offense of mail fraud, inserting that after Line 18 on Page 109?

MR. VAUDREUIL: I'd object to that, Your Honor, I guess as strenuously as I can. It's a thread that's running through the whole case obviously in terms of the theory of the offense. Whether that's a viable theory or not, but I think that the jurors here don't even know there is an offense of odometer tampering. They're not going to be instructed on it.

The evidence actually is probably equally based on the amount of time we spent in the last day on talking about rollbacks and talking about the mailings. The dealers and the customers and Mr. Peterson and the Department of Motor Vehicles people spent probably half of their time talking about the mailings both on direct and certainly all on cross. The only time that odometer tampering has ever been brought up as such is in—was in Mr. Salzberg's opening statement when he stated that his

client, you know, admits doing odometer tampering, but doesn't admit doing mail fraud.

I think it's really a dangerous, risky business to start instructing them what the defendant isn't on trial for. I think the proper instruction would be to tell them what he is on trial for and what must be proven and then the proper [137] argument under that is to say that my client, in terms of the defendant, Mr. Schmuck is not guilty of mail fraud because. I don't think it's really permissible argument and I don't think it's—I think it's really risky to instruct the jurors on offenses that they shouldn't find him guilty of.

I don't think—I think what we risk is confusing them getting somebody going up there and saying, well, gee, maybe there is an odometer tampering crime here. What's that? They've been talking about it an awful lot and at the very least you probobly risk getting a hung jury or inviting a hung jury perhaps. I just don't think it's necessary given the evidence.

It's really—What it really is is a back door, lesser-included, giving the jurors with no out. They aren't being given a lesser-included instruction and I think that's appropriate that it not be given and they're going to be at least told a little bit about this crime, this other crime with really no idea how it fits in here.

I don't intend to argue—I intend to argue the two elements of mail fraud and one being a scheme to defraud involving the odometers. The other having the equation the mailings and the two components there, the causation and the in furtherance of.

I think the appropriate argument, given the instructions, would be that, from the defendant's point of view, is [138] only the argument that the second half of the mail fraud component isn't met and my man's not guilty. I just don't think it's appropriate—well, I don't need to repeat it and I do object to that.

THE COURT: Mr. Salzberg.

MR. SALZBERG: Yes. The United States Attorney stated there was no testimony except the testimony which he related to the odometer tampering, but didn't the FBI agent testify that he was investigating an odometer tampering scheme in addition to mail fraud and that my client, Mr. Schmuck, knew that odometer tampering was a federal crime? I think it's—Again, I would reiterate I feel it's essential that the Jury be instructed, given the testimony by the witnesses, that it's not an odometer tampering trial. That the defendant is not on trial for odometer tampering.

Certainly the witnesses—the Jury has heard from all the witnesses testimony relating to cars whose odometers were turned back and although the phrase "odometer tampering" may or may not have been used by every witness, it's certainly been an underlying—an underlying theme that the Jury has absorbed throughout this trial and the U.S. Attorney I feel is attempting to use the prejudice that the jurors may feel against odometer tampering in its favor, which I would react to by again reiterating the need for the Jury to know that it's not an odometer tampering trial.

[139] The COURT: I'm not going to insert the statements that you asked for, Mr. Salzberg. I think the jurors are going to have to find the two essential elements according to the instructions I've given them. That's the crime that they are supposed to be considering and that's what they are going to have to base their decision on and you can argue the point that you're making, but I'm not going to instruct them that way.

About 308, which is proof of other crimes or acts, the jurors will be instructed they've heard evidence of acts of the defendant other than those charged in the Indictment. You may consider this evidence only on the question of what? What is the point? Is it absence of mistake? Is it intent? Is it motive? Is it plan?

MR. VAUDREUIL: It's got to be some of those. Let me see here. I think it would be motive, Your Honor.

I think it would be motive; perhaps intent; certainly plan and knowledge.

I don't really think absence of mistake—I think motive, intent, plan and knowledge for these reasons. It would be —It's certainly part of the theory of the case that this was a continuing operation and I think those go to that, that continuing operation, and Mr. Schmuck's motive to continue to have the operation work, thus having the titles be proper and things all go just smoothly. So, I think the [140] evidence of the other cars goes to those—to those thoughts or those directions, I guess; motive, intent.

THE COURT: I hate to put all four of those in. That sounds like we're really loading it up.

MR. VAUDREUIL: Motive and intent are really kind of the same I guess. We can say knowledge and plan.

THE COURT: Mr. Salzberg, what comments do you have on that?

MR. SALZBERG: We would object to both the evidence and the instruction on grounds that they are prejudicial.

THE COURT: Well, since I've overruled the objection as it relates to the evidence that I am going to give the instruction—well, I take that back. If you would prefer that I give no instruction at all, I think that's the defendant's prerogative.

MR. SALZBERG: No instruction at all vis-à-vis which issue, Your Honor?

THE COURT: Well, what I was planning to do was to give a restricting instruction. That is, that you can consider evidence of prior acts of the defendant, other than those charged in the Indictment, only on the question of, and specify what it—what aspects it could be considered for. If I don't give the instruction, the jurors are free to consider that evidence for any purpose that they want. So, I think it's an instruction that's favorable

to the [141] defendant. If the defendant chooses not to have it given, I would not give it.

MR. SALZBERG: Okay, Your Honor. I just want to discuss it with my partner for a minute.

(Whereupon, a conversation was had off the record between Attorney Salzberg and Attorney Steinberg.)

MR. SALZBERG: We would oppose the instruction altogether, Your Honor.

THE COURT: All right. Mr. Vaudreuil, do you wish to say anything more about that?

MR. VAUDREUIL: No, Your Honor.

THE COURT: Okay.

MR. VAUDREUIL: I would assume that I'm still allowed to argue this—argue that?

THE COURT: Yes, you are. Okay. Anything else before I take these back to get them ready for the Jury?

MR. VAUDREUIL: Your Honor, maybe I'm just not clear.

THE COURT: Oh, aiding and abetting. We have that problem.

MR. VAUDREUIL: Perhaps I can address—There's one other issue. In terms of the Schmuck instructions, as I call them, the paragraph as you rewrote it, taking out the instructing as a matter of law, the Court does intend to give that or does not intend to give that?

[142] THE COURT: No. I do not intend to give that.

MR. VAUDREUIL: Even as rewritten?

THE COURT: Right. That was an alternative.

MR. VAUDREUIL: Okay. I guess I'd request that it be given, but I can—If that's the Court's ruling, I have no further argument really.

THE COURT: Okay.

MR. SALZBERG: Just the aiding and abetting issue then.

THE COURT: Okay. I don't really see—I don't really see why either of those are necessary because I

think it's covered by the instructions on the elements of mail fraud.

MR. VAUDREUIL: I think that's correct, Your Honor. I think we made it clear in the instructions now as drafted that Mr. Schmuck doesn't need a mailman, doesn't need to do those kinds of things, so I guess I'd withdraw them, if that's necessary.

THE COURT: Do you have any objection?

MR. SALZBERG: No objection.

THE COURT: All right. I'll recess court then for ten minutes and we'll resume for closing arguments.

MR. VAUDREUIL: Your Honor?

MR. SALZBERG: Your Honor?

THE COURT: I guess not. I'll try again. [143] Mr. Vaudreuil.

MR. VAUDREUIL: There's two items that I wanted to cover before closing. First of all, does the Court intend to give a copy of the Indictment to the jurors or to pass it among them and let them read it and not take it to the jury room? I'm not sure which one you'll do in this case.

THE COURT: What I would ordinarily do is give them a copy of the Indictment with the instructions to take to the jury room with them.

MR. VAUDREUIL: Okay, because I wanted to know if, from closing, I'm not going to tell them you'll have the instructions with them. I know that's not preferable, but I think I would want to tell them you'll have the Indictment. You'll be able to go off count by count and look at the cars.

THE COURT: Right. That's right.

MR. VAUDREUIL: The second issue I wanted to raise really goes to what we were talking about in terms of the odometer tampering and the reference to odometer tampering and I want to get this clear so I don't have to object, or make my objections known now. I think, given what Mr. Salzberg submitted as a theory of the defense, which isn't going to be given I realize, and given

his opening statement, I at least assume that part of his closing argument would be basically to that effect that the client has not done odometer tampering or has done odometer tampering, but [144] Mr. Schmuck hasn't done mail fraud and these are the reasons and that's something I object to for basically the same reasons I objected in opening statement.

I think anytime, for the same reasons I talked about in the instruction, I guess. I think it hints to the Jury of some lesser-included that doen't exist in this case. It leads to confusion I think.

I think it's permissible and proper to argue that Mr. Schmuck hasn't done this crime, ladies and gentlemen, because there's two elements to prove and the second one hasn't been proven, that the mailings aren't in furtherance for these reasons and they would lead to detection or whatever.

I don't think it's appropriate to argue to the Jury that Mr. Schmuck is guilty of rolling back the odometers. Perhaps it's proper—I guess it would be proper to say he rolled back the odometers, but it isn't a mail fraud because this is what happened.

THE COURT: Wait. It would not be proper?

MR. VAUDREUIL: What I would object to is the specific reference of him being guilty of another crime. In trying to give a little leeway, it seems that it would be proper perhaps to argue that Mr. Schmuck rolled these cars back, but there's two elements to mail fraud and this second element hasn't been proven and therefore you should find him [145] not guilty.

THE COURT: What you're objecting to is an argument in which Mr. Salzberg says the Government charged him with the wrong crime?

MR. VAUDREUIL: In so many words, although I realize Mr. Salzberg wouldn't say it that way, but I think when you say he's guilty of another crime, using the words he's guilty of something else leaves that implication without a doubt.

THE COURT: Do you—Let me see if I understand what you are saying to me. You would not object if Mr. Salzberg said Mr. Schmuck has admitted he rolled back the odometers. That's not an issue in the case. There's no dispute about that.

There is a dispute about whether his conduct met the elements of mail fraud which is what he's charged with and you jurors have to decide whether those elements have been met and those elements are such and such.

MR. VAUDREUIL: That I think would be appropriate.

THE COURT: But your basic dispute is over Mr. Salzberg using the words, sure, he's guilty of odometer tampering, but he's not guilty of mail fraud?

MR. VAUDREUIL: Telling them that there is another crime that he is guilty of. I think the way the Court stated it is the appropriate way, to basically concede one [146] element. I realize—I think that's the appropriate way to go with it and I don't think it's appropriate and I think it leads to some problems if it's done the other way.

THE COURT: Mr. Salzberg, do you have any comment on that?

MR. SALZBERG: I think the attorney is attempting to restrict the contents of my closing argument. I'm not sure what authority he has for restricting it. I think he's attempting to use the Jury. He's attempting to prejudice the Jury naturally as much as possible in his favor, but I feel as you already stated that I—you already implied that I can say, Your Honor, that my client is not on trial for odometer tampering and I think it's in the record that he's—

THE COURT: Okay. That's okay.

MR. SALZBERG: Right.

THE COURT: But don't say he's guilty of odometer tampering.

MR. SALZBERG: I will not say he's guilty of odometer tampering.

THE COURT: Okay, and I would—I would object or find it objectionable if you—if the thrust of your argument were directed to the Government's having chosen the wrong crime to charge him with either, explicitly or implicitly.

MR. SALZBERG: No, I won't. I won't use that argument either, Your Honor, but I think it's on the record [147] that my client admitted to turning back odometers, to odometer tampering activities and I think it's perfectly appropriate for me to use this in my closing argument to rebut the prejudice against my client which no doubt certain members of the Jury may feel and I think it's a perfectly legitimate strategy for me to use in closing argument.

THE COURT: All right. With that understanding that you won't talk about his guilt of that?

MR. SALZBERG: I will not talk of his guilt of it.

* * * *

[200] THE COURT: Counsel, is there anything you wish to take up outside the presence of the Jury?

MR. SALZBERG: Yes, Your Honor. I'd like to renew my motion for judgment of acquittal under Rule 29(a).

THE COURT: That motion is denied.

* * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Maureen Beilke
Official Court Reporter
Date 4-9-84

I certifiy that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Nancy Schell
Official Court Reporter
Date 4-9-84

I certifiy that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Kim K. Leeitz
Official Court Reporter
Date 4-9-84

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK
Defendant.

MOTION FOR JUDGEMENT OF ACQUITTAL AT CLOSE OF GOVERNMENT'S CASE UNDER FRCrP 29(a)

Defendant Wayne Schmuck, by his attorney hereby moves the Court for judgement of acquittal of the offenses charged in the indictment herein, on the grounds that the evidence introduced by the United States is insufficient to sustain a conviction of such offenses.

This motion is based on the annexed Memorandum and all the files and records in this case.

Dated:

Respectfully submitted,

HARRY SALZBERG
Attorney for defendant
108 King Street
Madison, WI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR JUDGEMENT OF ACQUITTAL

(I) UPON EVIDENCE SUBMITTED BY THE GOVERNMENT, A REASONABLY MINDED JURY MUST HAVE A REASONABLE DOUBT AS TO WHETHER THE MAILINGS CAUSED BY THE DEFENDANT WERE FOR THE PURPOSE OF EXECUTING THE FRAUDULENT SCHEME, AND THEREFORE THE COURT SHOULD GRANT A MOTION FOR ACQUITTAL PURSUANT TO FRCrP 29 (a)

(A) UNLIKE THE MAILINGS AT ISSUE IN *UNITED STATES V. GALLOWAY*, 664 F2d 161, MOST ALL THE MAILINGS WHICH ARE THE SUBJECT OF THIS INDICTMENT CONSIST OF DOCUMENTS SPECIFICALLY REQUIRING AND CONTAINING ODOMETER READINGS, THEREBY MAKING DETECTION OF THE DEFENDANT'S SCHEME MORE LIKELY, AND RAISING GREAT DOUBT AS TO WHETHER THESE MAILINGS FURTHERED THE DEFENDANT'S ALLEGED FRAUDULENT SCHEME.

In *United States v. Maze*, 414 U.S. 395, the United States Supreme Court held that in order to prove mail fraud the government must demonstrate that the mailings at issue are sufficiently closely related to the defendant's scheme to bring it within the mail fraud statute, 414 U.S. at 399. The statute does not reach all mailings resulting from the fraudulent scheme, but only those mailings which are in furtherance of the scheme, 414 U.S. at 405. The Supreme Court emphasized that because the mailings endangered the scheme by increasing the likelihood of its detection, the mailings could not fairly be said to be in furtherance of the scheme, 414 U.S. 403. The Court aptly noted that "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice.'" 414 U.S. at 405.

In *United States v. Galloway*, 664 F2d 161, the Seventh Circuit Court of Appeals applied the Supreme Court's reasoning in *Maze* to an odometer roll-back scheme and held that the title application mailings did indeed occur for the purpose of executing the scheme. However, essential to the Appellate Panel's reversal of this Court's directed verdict for the defendant was the view that given the facts in *Galloway*, the mailings "were not counterproductive to the scheme, as were the mailings in *Maze*" *Id.* 664 F2d at 163, which endangered Maze's scheme by furthering the likelihood of detection. The Court noted in this regard that "nowhere on the title document were odometer readings required. Such a requirement, of course, might have made detection of the scheme more likely." *U.S. v. Galloway*, 664 F2d 161 note 7.

This case is thus amply distinguishable from *Galloway* since the mailed documents which constitute the alleged mail fraud counts in this case not only require an odome-

ter reading, but in almost every instance contain an explicit indication of the rolled back odometer figure. Given these facts the mailings are clearly counterproductive to the fraudulent scheme and, as the *Galloway* Court notes, make a detection of the scheme more likely. Since the mailings in this case endanger rather than further the scheme, the *Maze* ruling precludes these mailings from forming the basis of a mail fraud conviction.

The majority opinion in *Galloway* asserts that in *U.S. v. Shryock*, 537 F2d 207, the Fifth Circuit Court of Appeals upheld a mail fraud conviction where the documents included, as here, an indication of the odometer reading. However, in *Shryock*, the defendant was more closely involved with the fraudulent mailings since the defendant's employees had hand delivered the title applications directly to the state transportation authorities, 537 F2d at 209. But in this case the defendant was not a party to the transaction affecting the title transfer, that is, the mailings of the title applications from the retail dealer purchasers to the state transportation authorities. Here, the mailings occured after the scheme was completed—after the defendant had received the proceeds from the sale of the cars with rolled odometers, and the cars had been resold to a retail purchaser. The success of the scheme here in no way depended upon how the transfer of the title was completed.

The mailings which are the subject of the 12 count indictment against Wayne Schmuck are therefore "routine mailings themselves intrinsically innocent" which are not sufficiently related to the fraudulent scheme. *United States v. Tarnopol*, 561 F2d 466, cited in *United States v. Galloway* diss op. The mailings in no way helped to conceal the scheme. On the contrary the rolled back odometer readings on the face of the documents vastly increased the chances for detection of the scheme.

For the above stated reasons the government has presented evidence which would raise considerable doubt in

the minds of reasonable jurors that the mailings at issue were in furtherance of the fraudulent scheme, an essential element of the offense. The Court should grant a motion for acquittal pursuant FRCrP 29(a). See *U.S. v. Marable*, 574 F 2d 224.

Respectfully submitted,

HARRY SALZBERG
Attorney for Defendant
108 King Street
Madison, WI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES OF AMERICA,
Plaintiff,

v.

WAYNE SCHMUCK,
Defendant.

ORDER

Defendant has moved for a judgment of acquittal or, in the alternative, for a new trial. In support of the motion defendant contends that it was error to fail to instruct the jury on the lesser-included offense of odometer tampering and to allow in evidence of odometer tampering on cars other than those charged in the indictment. Also defendant contends that in prosecuting this case as a mail fraud which is a felony rather than as odometer tampering which is a misdemeanor, the United States Attorney has usurped the function of Congress.

For the reasons stated on the record during the course of the trial and in the pretrial proceedings, I find no merit in the first two grounds raised by defendant. The third ground, raised here for the first time, is unpersuasive. The Court of Appeals for the Seventh Circuit has upheld convictions for mail fraud on the same set of facts, *see United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981). Moreover, there is nothing in the mail fraud statute that prevents a prosecutor from using it against persons who benefit from the use of the mails to further their odometer tampering schemes. The fact that Con-

gress has made the act of odometer tampering a federal crime does not mean that Congress did not believe the use of the mails to carry out a whole scheme to defraud by odometer tampering cannot also be a federal crime. The focus in the first instance is upon the tampering itself; in the second instance, it is upon the criminal use of the mails.

ORDER

IT IS ORDERED that defendant's motion for acquittal or, in the alternative, for a new trial, is DENIED.

Entered this 29th day of December, 1983.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

83-CR-56

UNITED STATES

vs.

WAYNE T. SCHMUCK

Defendant.

[Filed Dec. 27, 1983]

MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now defendant Wayne T. Schmuck, by and through his attorney, Harry E. Salzberg, pursuant to Rule 29 (c) and Rule 33 of the Rules of Criminal Procedure, and respectfully moves this Honorable Court as follows:

1. That the Court grant defendant's motion for a judgment of acquittal, which was made after the close of the government's evidence, and orally renewed after the return of the jury verdict, for the grounds stated therein;

2. Alternatively, grant defendant a new trial in the interests of justice. As grounds for this motion, defendant alleges:

A. It was error for the Court to refuse defendant's requested jury instruction on the lesser included offense of

odometer tampering, as well as the requested instruction admonishing the jury that the defendant was not on trial for odometer tampering, and defendant's requested instruction on the theory of the defense, both in its original form and as modified. The consequence of failing to instruct the jury in this regard was that the government could count on jury hostility to odometer tampering to lower the government's burden of proof, and convict the defendant of mail fraud in a weak case, rather than let the defendant go without some conviction.

B. It was error for the Court to admit evidence of other conduct of the defendant, i.e. the total number of cars defendant tampered with during a 3 year period, and evidence from the ultimate purchasers of the cars named in the indictment of their purchase and subsequent experience with the cars, since this evidence served only to appeal to the juror's sympathies and prejudices, and was not necessary to the government's proof.

C. The tenor of the government's argument in this case is so far reaching that any incident of odometer tampering can be prosecuted as mail fraud. The controls imposed in every state over the transfers of automobile titles, which exist for the purpose of hindering crimes connected with the use and transfer of automobiles, practically guarantee that at some point after the automobile leaves the defendant's hands, a mailing of title documents will occur. Thus, the regulatory framework becomes the means of enhancing the odium and the punishment of defendant's wrongdoing. But fixing the level of seriousness of a crime, and the appropriate punishment, is a legislative function, not an executive one. When Congress has not seen fit to make odometer tampering a felony, even though raising the potential fine to $50,000.00, the government prosecutor usurps the legislative function by prosecuting odometer tampering as mail fraud.

Until the people's elected representatives declare that certain conduct is felonious, the principles of democratic government and separation of powers should prevent the prosecutor's usurpation of this decision under the guise of prosecutorial discretion.

D. Defendant has been deprived by these errors of his rights be secure against unreasonable seizure of his person, to have due process of law in a criminal prosecution, to have an impartial jury and the effective assistance of counsel, and not to have excessive, cruel, or unusual punishment imposed upon him, which rights are secured by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

3. This motion is based upon the entire records, files, and proceedings in this case and the authorities cited therein.

4. For the foregoing reasons the defendant should be acquitted by the Court or granted a new trial.

Dated: Madison, Wisconsin, December 27, 1983

Respectfully submitted,

/s/ Peter L. Steinberg for
HARRY E. SALZBERG
Attorney for Wayne T. Schmuck

108 King Street
Madison, Wisconsin 53703

(608) 256-4771

UNITED STATES DISTRICT COURT
THE WESTERN DISTRICT OF WISCONSIN

Docket No. 83-CR-56-C

UNITED STATES OF AMERICA

vs.

WAYNE T. SCHMUCK

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date February 24, 1984.

☒ With Counsel Harry Salzberg

☐ Guilty, and the court being satisfied that there is a factual basis for the plea.

☐ Nolo Contendere,

☒ Not Guilty

There being a verdict of

☐ Not Guilty. Defendant is discharged

☒ Guilty.

Defendant has been convicted as charged of the offense(s) of frauds and swindles, in violation of Title 18, U.S.C. § 1341, and fictitious name or address, U.S. Postal Service, in violation of Title 18, U.S.C. § 1342.

The court asked whether defendant had anything to say why judgment should not be pronounced because no sufficient cause to the contrary was shown or appeared

to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 90 days on Count I. It is recommended that work release privileges not be granted during the period of confinement.

As to each of Counts II through XII, it is adjudged that the defendant pay a fine to the United States of $50 and the imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of four (4) years, upon the terms and conditions of the court set forth in Appendix A, attached hereto; said probation on each count to run concurrently; said period of probation to commence upon release from physical custody on Count I of the Indictment. The fines are to be paid within six (6) months of the termination of the probation period.

It is ordered that execution of the sentence is stayed pending the outcome of the appeal in this case. The present conditions of release are continued pending appeal.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

/s/ Barbara B. Crabb
U.S. District Judge

February 24, 1984

APPENDIX A TO JUDGMENT AND PROBATION/COMMITMENT ORDER

The defendant is placed on probation for a period of *Four (4) year* upon the following terms and conditions:

(1) Defendant shall refrain from violation of any law (federal, state, and local), and shall get in touch immediately with defendant's Probation Officer if arrested or questioned by a law enforcement officer.

(2) Defendant shall associate only with law-abiding persons and maintain reasonable hours.

(3) Defendant shall work regularly at a lawful occupation and support defendant's legal dependents, if any, to the best of defendant's ability. When out of work defendant shall notify defendant's probation officer at once. Defendant shall consult defendant's probation officer prior to job changes.

(4) Defendant shall not leave the judicial district without permission of the probation officer.

(5) Defendant shall notify defendant's probation officer immediately of any change in place of residence.

(6) Defendant shall follow the probation officer's instructions and advice.

(7) Defendant shall report to the probation officer as directed.

(8) If the offense of which defendant has been convicted in this case is punishable by imprisonment for a term exceeding one year, or if the defendant has ever been convicted in any federal court or in any court of any state or in any

court of any political subdivision of any state of an offense punishable by imprisonment for a term exceeding one year, then the defendant shall not receive, possess, or transport in commerce or affecting commerce any firearm, as defined in 18 U.S.C. § 921(a)(3), including any hand gun, rifle, or shotgun.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRUCIT

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83 CR 56—Barbara B. Crabb, *Judge.*

Argued September 13, 1984—Decided November 12, 1985

Before FLAUM, *Circuit Judge*, and SWYGERT and FAIRCHILD, *Senior Circuit Judges.*

SWYGERT, *Senior Circuit Judge.* Defendant Wayne T. Schmuck appeals from his conviction of twelve counts of mail fraud, 18 U.S.C. § 1341 (1982). Because the defendant was improperly denied an instruction on a lesser included offense, we reverse and remand for a new trial.

The defendant concedes that he willfully rolled back odometers in order to sell used cars for inflated prices, a federal misdemeanor. 15 U.S.C. §§ 1984, 1990c(a) (1982). Nevertheless, he was indicted of mail fraud only,

a felony, and the district court denied his request that the jury be instructed on the odometer tampering offense as a lesser included offense of mail fraud.

The mail fraud statute requires a scheme to defraud and some mailing in furtherance of that scheme. According to the indictment and evidence at trial, the underlying scheme to defraud was the defendant's admitted odometer tampering. As for the mailing requirement, it is undisputed that the defendant did not personally use the mails to further his scheme. Rather, the unwitting retailers to whom the defendant sold the cars mailed forms, pursuant to the prevailing practice in Wisconsin, to the Secretary of State that included, *inter alia*, the defendant's fraudulent odometer readings. These forms were necessary to obtain a certificate of title. Without such a certificate, the cars were not marketable to the ultimate consumers.

I

The defendant urges outright reversal of his convictions on two grounds that can be dismissed summarily. First, he argues that no rational trier of fact could find that he used the mails in furtherance of his odometer-tampering fraud. In *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), we held that a rational trier of fact could convict on a mail fraud charge arising from a virtually identical odometer tampering scheme that also entailed the same mailings of forms by third-party retailers. We refuse to overrule that decision.

Second, defendant, contends that due process prohibits a mail fraud conviction based on a routine mailing by a third party that the defendant has no power to prevent. One answer is that he can prevent the mailing by abstaining from the fraud. In any event, this court in *Galloway*, 664 F.2d at 161, perceived no due process impediment to holding the same type of mailing a predicate for a mail fraud conviction. Nor did the Supreme Court

when it said that a person causes the mails to be used if he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen" even though use of the mails was not actually intended. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954).

Defendant argues that his convictions violated due process in still another respect because the mail fraud statute does not give fair warning that a fraud which causes a mailing in the manner present here is a violation of the statute. Regardless of what the defendant or any reasonable person might conclude upon reading the mail fraud statute in isolation, the expansive judicial interpretations of the language, going back many years, must be considered with the text, and leave no doubt that a fraud that foreseeably causes a mailing under the present circumstances is an offense.

II

The defendant also urges several grounds for a reversal and remand for a new trial. We need only each the lesser included offense issue.

Defendant moved in advance of trial for an instruction that would have permitted the jury to find him guilty of odometer tampering. He was entitled to such an instruction if, under these facts, odometer tampering can properly be considered a lesser included offense of mail fraud and if a rational juror could have found him innocent of mail fraud but guilty of odometer tampering. *See* Fed.R.Crim.P. 31(c); *Keeble v. United States*, 412 U.S. 205, 208 (1973).

We find that under these facts odometer tampering is a lesser included offense of mail fraud. It is possible, of course, to commit mail fraud without altering odometers. Apart from the mailing element, the mail fraud statute requires only some "scheme" to defraud. 18 U.S.C.

§ 1341. The scheme need not concern odometers, and even if it does, it need not be completed. The offense of odometer tampering, on the other hand, is necessarily concerned with odometers, and the tampering must be completed to be punishable under 15 U.S.C. §§ 1984, 1990c(a). This theoretical possibility of committing the greater offense without committing the lesser offense would be dispositive under the traditional definition of a lesser included offense; the lesser offense would lack the requisite identity of statutory elements with the greater offense. Two circuits continue to follow this traditional definition. *See United States v. Campbell*, 652 F.2d 760, 762 (8th Cir. 1981); *Government of Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3d Cir. 1977).

This circuit, however, does not follow the traditional definition. Rather than focus on theoretical possibilities, we look to the facts as alleged in the indictment and as proven at trial to determine whether the prosecution relied on proof of all the elements of the lesser offense to prove, in turn, guilt of the greater offense. *See United States v. Cova*, 755 F.2d 595, 597 (7th Cir. 1985); *accord United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir. 1983); *United States v. Johnson*, 637 F.2d 1224, 1238-39 (9th Cir. 1980); *United States v. Whitaker*, 447 F.2d 314, 319 (D.C. Cir. 1971). Thus, it is beside the point that a scheme to defraud *could* have been sufficiently established without proof of all the statutory elements of odometer tampering. What matters is that according to the prosecution's theory of the case, as expressed in the indictment and at trial, the defendant did intentionally cause odometers to be rolled back,[1] thereby satisfying all the elements of the odometer tampering statute.

[1] The prosecution argues that odometer tampering requires a greater degree of specific intent than does mail fraud because the former offense contains the additional element of "wilfulness." This court has recently held that the mental state required by 15 U.S.C. § 1990c is simply intent to commit the prohibited act; the "knowingly and wilfully" language "means exactly what it says rather than contain[s] a hidden requirement." *United States v. Ellis*, 739 F.2d 1250 (7th Cir. 1984). Thus, to be convicted of odometer tampering, the defendant need only intend to roll back odometers. Indeed, because it is not even necessary to show an additional intent to defraud others thereby, the odometer tampering statute actually requires a lesser showing of intent than does the mail fraud statute. *See id.*

To be sure, this more flexible definition of a lesser included offense carries with it the potential for abuse. The defendant might confuse the jury by securing instructions on a myriad of crimes only tangentially related to the one charged; as a result, the jury may feel pressured to return a compromise verdict even though it would otherwise be included to convict the defendant of the greater offense charged. We therefore join the District of Columbia Circuit in requiring the defendant, when requesting a lesser included instruction, to show some "inherent relationship" between the lesser offense proved and the greater offense charged. *See Whitaker*, 447 F.2d at 319.

An "inherent relationship" exists where the two offenses relate to the protection of the same interests and where proof of the greater offense can generally be expected to require proof of the lesser offense. *Id.* If such is the case, there is little chance that the jury will be confused by the lesser included instruction. Rather, the instruction will alert the jury to its duty to decide not simply whether the defendant is guilty, but what he is guilty of. Where there is such an inherent relationship, the two offenses can properly be viewed as simply two different degrees of the same general crime, and the instruction informs the jury that different degrees of culpability can be ascribed to the defendant's wrongful conduct.

We hold that there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud

offense. Both offenses protect against the same kind of societal wrong: fraud. And it can generally be expected that proof of mail fraud will entail proof of a completed underlying "fraud," although this is certainly not always true. *See supra* at 3-4; *cf. Whitaker*, 447 F.2d at 319 (generally, though not invariably, proofs must overlap). Moreover, it is difficult to see how an instruction on the underlying fraud will confuse the jury. Congress has deemed fraud that is perpetrated through the mails to be an especially serious offense, punishable as a felony by as much as five years in jail for each mailing. But a misdemeanor fraud, such as odometer tampering, is deemed less threatening to society and carries a lesser penalty. An instruction on odometer tampering simply informs the jury that the defendant's conduct is less serious if it does not entail a sufficient abuse of the mails to come within the mail fraud statute and encourages the jury to make an informed judgment as to the degree of culpability.

Having found odometer tampering to be a lesser included offense of mail fraud, we turn to the second requirement that must be satisfied in order to be entitled to an instruction on the lesser offense: that a rational trier of fact could have found the defendant innocent of the greater offense, but guilty of the lesser offense. *See Keeble*, 412 U.S. at 208; *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). The reason for this requirement is to ensure that the instruction is not "merely a device for defendant to invoke the mercy-dispensing prerogative of the jury."[2] *United States v.*

[2] On the other hand, we do not presume to eliminate jury equity; a judge cannot direct a verdict of guilty no matter how strong the evidence. It is proper, however, for the judge to discourage verdicts that disregard—whether intentionally or not—the evidence. As Judge Leventhal pointed out in *Sinclair*, 444 F.2d at 890:

> While a judge cannot eliminate the prerogative a jury retains to disregard his instruction and to acquit on the basis of conjecture rather than reason, the judge is not required to put the case to the jury on a basis that essentially indulges and even encourages speculations as to bizarre reconstructions [of the evidence].

Sinclair, 444 F.2d 888, 890 (D.C. Cir. 1971); *accord Medina*, 755 F.2d at 1273; *United States v. Busic*, 592 F.2d 13, 24-25 (3d Cir. 1978). And in a larger sense, this requirement prevents the judge and jury from encroaching on the other's domain. The jury resolves factual issues only; the judge decides the law. To be sure, the jury's decision to convict on the lesser rather than the greater offense should and does indirectly affect the defendant's ultimate punishment, an issue of law. But the jury makes such a decision only because it finds a factual element of the greater offense lacking; it cannot invade the province of the judge by deciding as a matter of law that, regardless of the facts, conviction of the lesser offense and the attendant lesser punishment are more appropriate.[3] On the other hand, in deciding what a rational juror can and cannot conclude from the evidence, the court should be wary of invading the exclusive factfinding prerogatives of the jury.

As the literal terms of the test indicate, the courts will rarely deem a potential jury finding "irrational." This is in keeping with the policies that underlie the test: the object is merely to discourage the jury from rendering mercy verdicts without invading the jury's province as the ultimate finder of fact. In general, the courts will find irrationality only where the theory of the defense is logically inconsistent with a guilty verdict on the lesser offense or where evidence of such guilt is so slight as not to raise a jury question on the issue. In the first instance, the danger of encouraging jury misconduct is obvious. An illogical verdict is by definition irrational and is probably motivated by factors extrinsic to the evidence at trial—i.e., a desire to render a mercy verdict.

[3] *But see supra* note 2.

Thus, if a defendant in a murder prosecution relies on an alibi defense, he can hardly ask the jury, in the alternative, to convict him of a lesser degree of homicide. Either he is guilty of murder or completely innocent; any other verdict would be an illogical compromise verdict. In such a case, the defendant is not entitled to a lesser included instruction. *E.g., Briley v. Bass*, 742 F.2d 155, 164-65 (4th Cir. 1984).

In the second instance, the courts will refuse to give the lesser instruction not because a verdict of guilty would be illogical or wholly unsupported by the evidence, but because the evidence to sustain the verdict is simply too thin to persuade a rational juror. *See, e.g., Medina*, 755 F.2d at 1273 n.2; *Busic*, 592 F.2d at 24-25; *Sinclair*, 444 F.2d at 890. Yet if a rational juror should be expected to return verdicts that are plausible as well as merely logical or merely supported by some scintilla of evidence in the record, courts must take care to allow jurors to choose from a broad range of plausible verdicts. Thus, the courts draw all inferences in favor of finding the potential verdict rational. *See Sinclair*, 444 F.2d at 890. Where the verdict would require a bizarre or overly imaginative reconstruction of events, the verdict is irrational. *See id.* The classic example is where a defendant is found in possession of more than a ton of marijuana and is charged with possession with intent to distribute. Although it is possible that the defendant had no intent to distribute, such a possibility is so improbable that an instruction on the lesser offense of simple possession is proper. *E.g., United States v. Silla*, 555 F.2d 703, 706-07 (9th Cir. 1977).

Turning to the case at bar, an acquittal of mail fraud would have been logically consistent with a conviction of odometer tampering. Such a verdict would follow from a finding that the mailings were not sufficiently in furtherance of the underlying fraud to justify a mail fraud conviction.

As for the requirement that the verdict be rational and plausible as well as logical, such a conclusion of the mailings issue would have been substantially supported by the record evidence. This is not a case where the defendant presented little or no evidence on point. *Cf. Busic*, 592 F.2d at 25 (it is not enough that the defendant formally contested the existence of the additional element distinguishing the greater offense from the lesser; "[t]he contest must be real"). Indeed, the defendant rested his entire defense on the theory that the mailings element was lacking. The jury could have rationally and plausibly concluded that mailings by third-party retailers who were not under the control of the defendant did not sufficiently further the fraud to justify a conviction. True, the mailing of fraudulent odometer readings allowed the unwitting retailers to gain the certificate of title necessary to market the cars, which in turn encouraged them to continue to do business with the defendant. Yet the jury could have plausibly concluded that, on balance, the mailings were counterproductive to the fraud because they brought the fraudulent odometer readings to the attention of the authorities.

Alternatively, the jury could simply conclude that, aside from the counterproductive effect of the mailings, the mailings were too tangential to the success of the scheme to be deemed "in furtherance" of the scheme. Although the mailings here may have "furthered" the scheme in the literal sense of the word, it is clear that the statute requires something more. For in the modern economy, it is difficult to imagine a transaction that does not at some point involve some tangential use of the mails by some party at least remotely related to the defendant. Lest all fraud be subsumed by the mail fraud statute, the courts require that the mailings further the fraud in the sense that it is at least incidental to an essential element of the fraud. *United States v. Lea*, 618 F.2d 426, 430 (7th Cir.), *cert. denied*, 449 U.S. 823 (1980).

Whether the retailers' ability to secure title was essential to the defendant's scheme and whether the mailings of odometer readings to obtain such title were incidental to that end are questions for the jury. These are issues that involve difficult line-drawing problems; this is not a case where a conviction on the lesser offense would require bizarre or overly-imaginative inferences from the evidence. *See Silla*, 555 F.2d at 706-07; *Sinclair*, 444 F.2d at 890.

It is true that in *Galloway*, 664 F.2d at 161, we stressed that a jury could rationally convict on virtually identical facts. But we did not hold the opposite verdict to be irrational; we simply pointed out that the mailings issue was one for the jury to decide. Consistent with *Galloway*, we now hold that the jury could have rationally reached either verdict. Mailings by third parties not under the control of the defendant that indirectly, if at all, further the underlying fraud may or may not be sufficiently "in furtherance" of the fraud to justify a mail fraud conviction; the issue is one of fact, and the two opposite conclusions are both sufficiently plausible to be within the purview of the jury's rational discretion.

III

Because the defendant was entitled to an instruction on odometer tampering, we reverse his convictions and remand for a new trial. Circuit Rule 18 shall not apply.

FAIRCHILD, *Senior Circuit Judge*, concurring in part, dissenting in part.

I concur in Part I, but respectfully dissent from Parts II and III. Even if we assume the adherence of this Circuit to the doctrine of *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), relaxing the traditional concept of a lesser included offense, I do not find an inherent relationship between odometer alteration and mail fraud.

The elements of mail fraud, 18 U.S.C. § 1341, relevant to this case are (1) having devised a scheme to defraud and (2) knowingly causing mail delivery of matter for the purpose of executing the scheme. No particular fraudulent act need have been accomplished, although as in the present case, the devising of the scheme is very commonly proved by showing particular instances of fraudulent conduct and inferring the scheme from the conduct. Such conduct may be criminal under state or federal law but need not be. In the present case it happens to be a federal offense. Defendant's devising a scheme to defraud was established by proof that he had caused odometers to be altered on many automobiles he had acquired and later sold including those to which the twelve mailings related. Under the traditional test of comparing statutory elements, knowing and willful alteration of an odometer is not an element necessarily included in mail fraud.

Moreover, one cannot spell out of the present indictment a charge that defendant knowingly and willfully caused the alteration of the odometer on any particular automobile. Any implication to that effect arises from the fact that each count alleges the mailing, by a dealer, of an application for title for a specified automobile, and charges that defendant caused each mailing for the purpose of executing the scheme.

At trial, in order to prove the creation of the scheme and the relationship of each mailing, the Government proved that the odometer on the particular vehicle was one of those which defendant had caused to be altered. It is this evidence which affords the basis of defendant's claim that the jury should have been told that on each count it could convict him of odometer alteration if not convinced that the mailings furthered the scheme.

The leading case relaxing the traditional test for a lesser included offense is *United States v. Whitaker*,

447 F.2d 314. That opinion, at page 319, states the rule as follows:

> A more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, *i.e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. This latter stipulation is prudently required to foreclose a tendency which might otherwise develop towards misuse by the defense of such rule. In the absence of such restraint defense counsel might be tempted to press the jury for leniency by requesting lesser included offense instructions on every lesser crime that could arguably be made out from any evidence that happened to be introduced at trial.

(Footnote omitted.) The part of the *Whitaker* test which is so clearly lacking in the present case is that the two offenses "must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."

I think that no such close relationship exists between the offenses of odometer alteration and mail fraud.

In *Whitaker*, itself, the offense charged was burglary and the court found that unlawful entry was an included offense where proved even though burglary could occur after an authorized entry.

In *United States v. Pino*, 606 F.2d 908 (10th Cir. 1979), the offense charged was involuntary manslaughter while driving a motor vehicle in an unlawful manner without due caution and the court held that careless operation of a vehicle was an included offense where proved.

In *United States v. Johnson*, 637 F.2d 1224 (9th Cir. 1980), the offense charged was assault resulting in serious bodily injury and the court held that assault with a dangerous weapon with intent to do bodily harm was an included offense where proved.

In *United States v. Stolarz*, 550 F.2d 488 (9th Cir.), *cert. denied*, 434 U.S. 851 (1977), the offense charged was assault with intent to commit murder and the court held that assault with a dangerous weapon with intent to do bodily harm was an included offense where proved.

In *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985), the offense charged was conspiracy to distribute cocaine and this court held that conspiracy to possess cocaine was an included offense.

The facts of all these cases demonstrate a much closer relationship between the offense not charged but proved in the course of trial and the offense charged than can be discerned between odometer alteration and mail fraud. It seems fair to say that in each case the offense found to be lesser included comes within a hair's breadth of fulfilling the traditional test of comparing statutory elements.

In *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1983), the Tenth Circuit held that there was no inherent relationship between the offense incidentally proved and the offense charged. The defendant had sought a lesser included offense instruction as to violation of EPA Certification Regulations. The charged offenses were conspiracy, mail fraud and racketeering.

There is apparently no case holding that fraudulent conduct which happens to constitute a federal offense and is proved in establishing the elements of mail fraud is included within mail fraud. Indeed, I would suppose that if properly charged, a defendant could be convicted of both odometer alteration and mail fraud and the punishments could be cumulative.

Going on to another point, even if the lesser offense is included in the greater, the evidence must "permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater" before defendant is entitled to an instruction on the point. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *United States v. Busic*, 592 F.2d 13, 24-25 (2nd Cir. 1978). With all respect, I do not believe that the evidence and concessions made by defendant in this case leave open any issue of fact as to mailings furthering the scheme. The scheme proved was clearly an ongoing course of business. There was proof that defendant admitted altering odometers on a great many cars over a substantial period of time. In the proof of the twelve counts it was shown that one dealer who bought from defendant made four successive purchases and mailed applications for each of them in order to obtain titles in the names of his customers. Another dealer made five successive purchases and similar mailings. Beyond any doubt, the mailings not only furthered, but were essential to the continued success of the scheme.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 12, 1985

Before

HON. JOEL M. FLAUM, Circuit Judge

HON. LUTHER M. SWYGERT, Senior Circuit Judge

HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin

No. 83 CR 56—Judge Barbara B. Crabb

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, and the case is REMANDED, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Amendment: March 4, 1986

February 27, 1986

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin
No. 83 CR 56—Barbara B. Crabb, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to grant a rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on November 12, 1985 be, and are hereby, VACATED. This case will be reheard *en banc* at the convenience of the Court.

The parties are requested to file supplemental briefs on two questions:

1) Whether the inquiry into legislative intent that informs the decision to allow consecutive punishments, *see Garrett v. United States*, 105 S.Ct. 2407 (1985); *United States v. Woodward*, 105 S.Ct. 611 (1985); *Albernaz v. United States*, 450 U.S. 333 (1981); should be used to determine whether one offense is a lesser included or necessarily included offense of another for purposes of Fed. R. Crim. P. 31(c), and if adopted, whether this inquiry has implications to our holding in *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985).

2) Whether, if this inquiry is employed, odometer tampering (in violation of 15 U.S.C. 1984) is a necessarily included offense of mail fraud (in violation of 18 U.S.C. 1341).

The supplemental briefs shall be filed simultaneously on or before March 19, 1986.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

WAYNE T. SCHMUCK,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83 CR 56—Barbara B. Crabb, *Judge.*

Reheard *En Banc* June 9, 1986—Decided January 21, 1988

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, and RIPPLE, *Circuit Judges*, and SWYGERT* and FAIRCHILD, *Senior Circuit Judges.*

FAIRCHILD, *Senior Circuit Judge.* In *United States v. Schmuck*, 776 F.2d 1369 (7th Cir. 1985), a divided panel decided that under the facts of this mail fraud prosecu-

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* Senior Circuit Judge Swygert heard oral argument and voted at the post-argument conference to reverse, adhering to the reasons stated in his opinion herein for the panel. 776 F.2d 1369. Because of illness, however, he has not participated further.

tion, the offense of knowing and willful odometer alteration was a lesser included offense within the charged offense of mail fraud. Defendant's conviction was reversed, therefore, because it was error to refuse an instruction under Rule 31(c), F. R. CRIM. P., on the possibility of finding defendant guilty of the odometer offense. Although odometer alteration is not a statutory element of mail fraud, the panel, relying on *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971), held that there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. 776 F.2d at 1371. Accordingly the odometer offense proved by the evidence constituted a lesser included offense for the purpose of Rule 31(c).

The panel decision was vacated and rehearing *en banc* granted. *United States v. Schmuck*, 784 F.2d 846 (7th Cir. 1986). We now reject the *Whitaker* doctrine and decide that the odometer offense, though proved, was not a lesser included offense, or, as Rule 31(c) says "an offense necessarily included in the offense charged." All other significant claims raised were correctly decided adversely to defendant in Part I of Judge Swygert's opinion, 776 F.2d at 1369-70. We now adopt Part I and affirm.

I

Defendant Schmuck was convicted, after a jury trial, of 12 counts of mail fraud. Each count of the indictment alleged a scheme by Schmuck to defraud purchasers of used automobiles by representing that the automobiles had substantially less mileage than was true. Schmuck would purchase automobiles, cause their odometer readings to be altered, offer them to dealers, and provide purchasing dealers with an odometer statement reflecting the false mileage. The dealers would sell the cars to retail customers. Both the dealers and the customers would rely on the false readings and pay more than if readings had not been reduced. In order to obtain titles in the names of their customers, the dealers would mail Wisconsin title

applications to the Wisconsin Department of Transportation. Each count of the indictment alleged the mailing of an application for title for an automobile by a dealer on a specified date. Five different dealers were named; three dealers made only one mailing, one made four, and one five. It was charged that Schmuck caused each mailing for the purpose of executing the scheme.

Pursuant to Rule 31(c), defendant moved prior to trial for an instruction that would have permitted the jury to convict him of odometer alteration as a lesser included offense of mail fraud, presumably on each count. That motion was denied. He was convicted and appealed.

In reversing and remanding for a new trial, the panel rejected the "traditional" definition of a lesser included offense, in favor of the "inherent relationship" approach first expounded in *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). The traditional (elements) test requires identity of the elements of the two offenses, such that some of the elements of the crime charged themselves comprise a separate, lesser offense; to be necessarily included, the elements of the lesser offense must be a subset of the elements of the charged offense. *See Sansone v. United States*, 380 U.S. 343, 349-50 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *United States v. Campbell*, 652 F.2d 760, 762 (8th Cir. 1981); *Government of the Virgin Islands v. Parrilla*, 550 F.2d 879, 881 (3rd Cir. 1977). Thus where the lesser offense requires an element not required for the greater offense, an instruction should be refused.[1]

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[1] Several courts have listed five conditions to be met where a Rule 31(c) instruction is requested. The second is "the elements of the lesser offense must be identical to part of the elements of the greater offense" and the fifth "in general the chargeability of lesser included offenses rests on a principle of mutuality, that if proper, a charge may be demanded by either the prosecution or defense." *Whitaker*, 447 F.2d at 317; *United States v. Campbell*, 652 F.2d 760, 761 (8th Cir. 1981); *United States v. Chapman*, 615 F.2d 1294, 1299 (10th Cir.), *cert. denied*, 446 U.S. 967 (1980); *but*

Broadly speaking, there are two elements of an offense under the mail fraud statute: (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts); and (2) use of mail for the purpose of executing the scheme or attempting to do so.[2] It is not required that any part of the contemplated scheme be performed, although in practice fraudulent conduct usually is proved in order to establish the scheme. The odometer offense consists of knowingly and willfully altering or causing alteration of an odometer with intent to change the number of miles indicated.[3] Each statute

see n.5 *infra*, as to Tenth Circuit position. Another formulation is that the lesser offense must be such that it is impossible to commit the greater offense without having committed the lesser. *Government of Virgin Islands v. Aquino*, 378 F.2d 540, 554 (3rd Cir. 1967). "The lesser included offense doctrine does not apply where the lesser offense includes an element, such as possession, not required for the greater offense." *Campbell*, 652 F.2d at 763.

[2] 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] 15 U.S.C. § 1984 provides:

> No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

[Continued]

requires proof of facts not required by the other. The two offenses are separate. *Blockburger v. United States*, 284 U.S. 184, 187-88 (1957).

In determining, for this purpose, the elements of the offense charged, the ordinary focus is upon the statute defining the offense. Where the statute prescribes an element in general language, capable of wide variation in types of conduct, e.g., mail fraud, falsification (18 U.S.C. § 1001), continuing criminal enterprise (21 U.S.C. § 848), RICO (18 U.S.C. § 1963), failure to perform any of several types of statutory duty (e.g., 26 U.S.C. § 7203) there is logical appeal for the proposition that the terms of the indictment will narrow the scope of the elements to be examined. *See United States v. Stavros*, 597 F.2d 108, 110 (7th Cir. 1979); *but see United States v. Kimberlin*, 781 F.2d 1247, 1257 n.10 (7th Cir. 1985). Given the present indictment, however, alleging as one element devising a scheme to defraud purchasers of automobiles with altered odometers, knowingly and willfully causing an odometer to be altered is not identical to the element of having devised the scheme.

The District of Columbia Circuit rejected strict comparison of elements in favor of inquiry whether there was an "inherent relationship" between the crime charged and a lesser offense proved at trial. The defendant in *Whitaker* had been charged with first degree burglary, and his request for an instruction permitting conviction of the lesser offense of unlawful entry was denied, because the District of Columbia Code did not exclusively require unlawful entry as an element of first degree burglary, and therefore unlawful entry would not be a lesser included offense under the traditional test. However, because the proof showed that defendant had, in

[3] [Continued]

> § 1990c(a) prescribes a misdemeanor penalty for knowing and willful violation of any provision of the subchapter, including § 1984.

fact, committed the burglary by means of an unlawful entry, in reversing and remanding for a new trial, the court held that

> [a] more natural, realistic and sound interpretation of the scope of "lesser included offense," in line with our own views on the subject, is that defendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at trial in proof of the greater offense, with the caveat that there must also be an "inherent" relationship between the greater and lesser offenses, *i.e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense.

447 F.2d at 319.

The *Whitaker* court went on to note that the Constitution and the common law require that the charge in the indictment give the defendant notice that he could also be convicted of any lesser included offenses, if the evidence so warrants. The prosecution as well as the defendant may seek an instruction pursuant to Rule 31(c) under the traditional test, because all elements of the lesser included offense have, by definition, been charged. *Whitaker* dispensed with the mutuality requirement, because of "considerations of justice and good judicial administration. . . . [T]he defense ought not to be restricted by the stringent constitutional limits upon the prosecutor's right . . . [and] doubt as to whether the prosecution could rightfully have requested such a charge should not bar the charge being given at the request of the defense." *Id.* at 321.

Applying the *Whitaker* approach, the panel in the present case concluded that

> there is an inherent relationship between mail fraud and the "fraud" that underlies the mail fraud offense. . . . [I]t can generally be expected that proof of mail fraud will entail proof of a completed underlying "fraud," although this is certainly not always true. . . . An instruction on odometer tampering simply informs the jury that the defendant's conduct is less serious if it does not entail a sufficient abuse of the mails to come within the mail fraud statute and encourages the jury to make an informed judgment as to the degree of culpability.

776 F.2d at 1371.

Having found the requisite relationship between odometer alteration and mail fraud, the panel turned to the second requirement of the right to a lesser included offense instruction: whether the proof of the element necessary for the greater crime but not for the lesser crime is sufficiently in dispute so that a rational jury could find the defendant not guilty of the greater but guilty of the lesser. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *Sansone v. United States*, 380 U.S. 343, 350 (1965); *Berra v. United States*, 351 U.S. 131, 134 (1956); *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). Whatever the test used to determine whether one offense is included within another, there is agreement that there must be a separable issue in the case as to the distinguishing element. *Cf., e.g., United States v. Pino*, 606 F.2d 908, 917 (10th Cir. 1979) (inherent relationship approach) with *United States v. Campbell*, 652 F.2d 760, 763 (8th Cir. 1981) (traditional test). The panel held that the jury could have rationally found that the mailings were counterproductive to the fraud because they brought the fraudulent readings to the authorities' attention, or that the mailings were too tangential to the success of the scheme to be deemed "in furtherance" of the scheme.

II

A. *Rule 31(c)*

We reject the inherent relationship test,[4] and hold that an offense is necessarily included within another for the purpose of Rule 31(c) only when the elements of the lesser offense form a subset of the elements of the charged offense.[5] The elements approach is grounded in

[4] The author of this opinion also adheres to his previously expressed view that there is no inherent relationship between odometer alteration and mail fraud even if the *Whitaker* doctrine were to prevail. 776 F.2d at 1373-75, Fairchild, *J.*, concurring in part, dissenting in part.

[5] The Second Circuit states the test in terms of elements. *See United States v. Lo Russo*, 695 F.2d 45, 52 n.3 (2d Cir. 1982), *cert. denied sub nom. Errante v. United States*, 460 U.S. 1070 (1983). We have found no case, however, where the Second Circuit has rejected the *Whitaker* approach. The Third Circuit states the elements test and asserts specifically "[t]he elements of the offense are compared *in the abstract*, without looking to the facts of the particular case." *Government of Virgin Islands v. Joseph*, 765 F.2d 394, 396 (3rd Cir. 1985). The Eighth Circuit has adhered to the elements test, noting, but taking no position on, the question of abandoning mutuality. *United States v. Campbell*, 652 F.2d 760, 762-63 (8th Cir. 1981).

Decisions of the Fourth Circuit, *see United States v. Carter*, 540 F.2d 753, 754 (4th Cir. 1976), and the Fifth Circuit, *see United States v. Williams*, 775 F.2d 1295, 1302 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1477 (1986), are consistent with the elements approach.

Circuits adopting the inherent relationship test are the District of Columbia, *Whitaker*, 447 F.2d 314 (D.C. Cir. 1971); and the Ninth, *United States v. Martin*, 783 F.2d 1449, 1451-53 (9th Cir. 1986).

The Tenth Circuit adopted the *Whitaker* doctrine in a 1979 decision, *United States v. Pino*, 606 F.2d 908, 914-17 (10th Cir. 1979). In a 1980 decision, the court stated the traditional test, including the requirement of mutuality. *United States v. Chapman*, 615 F.2d 1294, 1298-99 (10th Cir.), *cert. denied*, 446 U.S. 967 (1980). In 1982, the court applied the *Whitaker* doctrine, *citing Pino*, but not *Chapman*. *United States v. Zang*, 703 F.2d 1186, 1196 (10th Cir.), *cert. denied sub nom. Porter v. United States*, 464 U.S. 828 (1983). *Zang* happened to be a prosecution for mail fraud. The scheme to defraud involved overcharging for crude oil by miscertification of the "tier" of the oil. Such miscertification was a violation of EPA regulations, and the court found this violation was not a lesser included offense because there was no inherent relationship between it and mail fraud. In 1987, the Tenth Circuit relied on *Pino* and *Whitaker* in affirming the conviction of a lesser offense, one element of which was not included in the offense charged. *USA v. Cooper*, 812 F.2d 1283 (10th Cir. 1987). The dissenting judge would approve the *Whitaker* doctrine where a defendant requested the instruction, but concluded that in the case before the court, defendant had been convicted of an offense not charged.

the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendant of the potential for conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the concept of "necessarily included" under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy.

Although the Supreme Court has not spoken directly to this issue,[6] we believe that decisions involving Rule 31(c) motions suggest the Court's adherence to the traditional method. In *Keeble v. United States*, 412 U.S. 205 (1973), the Court held the defendant entitled to an instruction on a lesser included offense. The Court compared the statutory elements of the offense charged—assault with intent to commit serious bodily injury—with those of the offense on which an instruction was sought —simple assault—stating

> an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented.

[6] The Court has articulated a statutory elements test for a lesser included offense for double jeopardy purposes. *See, infra*, pp. 12-13.

Id. at 213. The Court did note the *Whitaker* decision and that it had dispensed with mutuality as a necessary prerequisite to the defendant's right to a lesser included offense instruction. The Court found it unnecessary to decide that question. *Id.* at 214 at 14.

Similarly, in *Sansone v. United States*, 380 U.S. 343 (1965), the elements of violation of § 7201 of the Internal Revenue Code of 1954, willful tax evasion, were compared with those of § 7207, willful filing of a fraudulent or false return, and § 7203, willful failure to pay taxes when required, to determine whether the latter misdemeanors were offenses included within the felony charged under § 7201. The Court determined that petitioner was not entitled to a lesser included offense instruction because on the facts of the case, the three statutes covered the same ground. The Court said that "§ 7201 necessarily includes among its elements actions which, if isolated from the others, constitute lesser offenses" and instruction should be given if a jury could rationally find that "although all the elements of § 7201 have not been proved, all the elements of one or more lesser offenses have been" proved. *Id.* at 351; *see also Berra v. United States*, 351 U.S. 131, 134 (1956) ("where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction").

These cases counsel in favor of the elements test because the Court examined and compared statutory elements in deciding whether the lesser offense was necessarily included in the offense charged. The decisions nowhere suggest any different inquiry into the relationship between offenses, nor any relaxation of the traditional test where a lesser offense proved could be deemed inherently related to the charged offense.

The statutory elements test is also faithful to the text of Rule 31(c), where the critical phrase is "necessarily included in the offense charged." The inherent relationship approach in effect reads out "necessarily included in" and substitutes something like "factually related to and serves the same policy goals as" the charged offense. Neither the court in *Whitaker* nor any decision adopting its analysis has addressed how the language of the Rule gives rise to the inherent relationship test.

The text of the Rule makes no distinction between a motion made by the defendant or by the government. Yet the inherent relationship approach requires that motions by the government and the defendant be treated differently, because the charge of the greater offense does not give notice that defendant is facing a charge of a lesser offense all the elements of which are not identical to elements of the charged offense. If the determination whether the crimes are sufficiently related is not made until all the evidence is developed at trial, the defendant may not have had notice constitutionally sufficient to support an instruction at the prosecution's request. Thus, the relationship test dispenses with the requirement of mutuality without explaining how the text of the Rule supports a different result depending upon who makes the motion.

Moreover, the history of the Rule suggests that it codified the traditional approach. "At common law the jury was permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged. This rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." *Beck v. Alabama*, 447 U.S. 625, 633 (1980); *United States v. Cova*, 755 F.2d 595, 597 (7th Cir. 1985); *see* 2M Hale, Pleas of the Crown 301-02 (1736); *Rex v. Withal & Overend*, 168 Eng. Rep. 146 (1772). In 1872, this concept was enacted as a statute,[7] now contained in Rule 31(c). The advisory Committee

[7] "[I]n all criminal cases the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment. . . ." 17 Stat. 197, 198 (1872).

Notes state that the Rule is a "restatement of existing law." *See Keeble*, 412 U.S. at 208 n.6. Thus, there is no indication that the Rule was intended to abrogate the traditional approach to lesser included offenses, including the availability of an instruction in aid of the Government, nor can the Supreme Court's recognition of the defendant's right to an instruction be read as an endorsement of any non-mutual restrictions on the Government.

A significant consideration is the inherent relationship test's lack of certainty and predictability. *See United States v. Johnson*, 637 F.2d 1224, 1238 (9th Cir. 1980) (statutory approach "may be appealing in its promise of certainty and intellectual purity"). Finding an inherent relationship requires a determination that the offenses relate to the same interests and that "in general" proof of the lesser "necessarily" involves proof of the greater. *Whitaker*, 447 F.2d at 319. These new layers of analysis add to the uncertainty of the propriety of an instruction in a particular case: not only are there more issues to be resolved, but correct resolution involves questions of degree and judgment, with the attendant probability that the trial and appellate courts may differ.

Another problem with relaxation of the traditional test is that relaxation may well permit defendants to seek a lenient outcome by requesting a lesser included offense instruction on every lesser offense that could possibly be made out from the evidence. This tendency to misuse the Rule was recognized in *Whitaker*, and is the reason why the *Whitaker* court required that there must be an inherent relationship between the lesser offense and the offense charged. 447 F.2d at 319.

We find, on balance, no persuasive reason to substitute the *Whitaker* doctrine for the traditional approach.[8]

[8] In *United States v. Cova*, 755 F.2d 595 (7th Cir. 1985), defendants were charged with conspiracy to distribute cocaine. The district court found insufficient evidence, but submitted an amended charge of conspiracy to possess, and defendants were convicted. [Continued]

B. Double Jeopardy and Cumulative Punishment

Rule 31(c) uses the language, "an offense necessarily included in the offense charged." Many of the decisions on a Rule 31(c) problem use the term "lesser included offense." The "lesser included offense" concept is also significant in determining certain claims of double jeopardy or unlawful cumulative punishment. *See Brown v. Ohio*, 432 U.S. 161 (1977).

It seems desirable that, as nearly as possible, the terminology should have the same meaning in both contexts. Using the elements test for Rule 31(c) problems at least approaches keeping the same meaning.

It is at least arguable that in the double jeopardy and cumulative punishment contexts the requisite identity of elements is to be determined solely from comparison of the two statutes, and that the indictment does not narrow the type of elements to be examined. *Brown*, 432 U.S. at 168; *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Woodward*, 469 U.S. 105, 108; *United States v. Kimberlin*, 781 F.2d 1257, 1255-57 (7th Cir. 1985), *cert. denied*, 107 S. Ct. 419 (1986). The focus is "on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *Illinois v. Vitale*, 447 U.S. 410, 416 (1980). We need not decide in the case before us whether the allegations of the indictment will properly narrow the scope of the statutory elements to be examined in a given case.

The judgment appealed from is AFFIRMED.

[8] [Continued]
Although there was no discussion of *Whitaker*, this court affirmed, holding that conspiracy to possess (proved) was a lesser included offense of the charged conspiracy to distribute. *Id.* at 599. Because it is possible for persons acquiring lawful possession to conspire to distribute, the elements test seems not to have been fulfilled. To the extent that *Cova* stands for a permitted departure from the elements test, it is overruled. *See also* reference to *Cova* in *United States v. Kimberlin*, 781 F.2d 1247, 1256-57, and n.10.

FLAUM, *Circuit Judge*, with whom CUDAHY, *Circuit Judge*, joins, dissenting.

I do not agree with the majority's conclusion that the use of the "inherent relationship" test in determining when to give a lesser included offense instruction contravenes either the language or purpose of Federal Rule of Criminal Procedure 31(c). Accordingly, I would leave *United States v. Cova*, 775 F.2d 595 (7th Cir. 1985), and its predecessors intact as the law of this circuit. Applying that test, I conclude that the district court erred in denying the defendant's requested lesser included offense instruction on odometer tampering.

I.

It seems to me inherently contradictory to discuss the appropriateness of giving any jury instruction without reference to the evidence adduced at trial, which will always permit the most complete assessment of what instructions the record will support. Nonetheless, the majority concludes that to do so would violate the text of Rule 31(c), which provides in relevant part that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged . . . ." The rule does not specifically mention instructions. Nevertheless, we know they are necessary to inform the jury of the existence and elements of appropriate offenses. None of the reasons advanced by the majority persuade me that a more constricted analysis of whether an instruction is supportable is necessary or even desirable simply because the proposed instruction presents the jury with an optional lesser charge. If the record fairly and rationally supports a tendered instruction, and if the instruction comports with the law on the subject and does not unfairly prejudice any party, we have no grounds for barring it.

To confine the determination of whether to give an instruction to an analysis of statutes is to impose an artificial restraint on the instruction formulation process.

Nowhere is this artificiality more apparent than in *Cova*, the case that the majority herein overrules. In that case this court held that in light of the manner in which the government had proved its case, conspiracy to possess cocaine was a lesser included offense of conspiracy to distribute it. Conspiracy was a lesser included offense because the government offered proof that the defendant's method of supposed distribution included obtaining possession. 755 F.2d at 598. The majority of this *en banc* court concludes that *Cova's* result could not be sustained under the element comparison test "[b]ecause it is possible for persons acquiring lawful possession to conspire to distribute," an occurrence that is probably rare but, more significantly, is completely alien to the government's theory in *Cova*. *See supra* n.8. In plain terms, had the "elements" test been applied in *Cova*, the government would have lost a case that it had proved for a reason that had nothing to do with the case itself.

The test applied in *Cova* does not really change the question to be asked under Rule 31(c) in determining whether an instruction on a lesser offense should be given; rather, it simply expands the scope of the inquiry undertaken in answering that question. After all, it is the indictment that delimits the "offense charged" by the government in a particular case. The specific offense is further defined by the proof presented by the government at trial. Permitting consideration of the indictment and succeeding evidence, *in addition* to the elements set forth in the relevant statutes, can only lead to a more complete and accurate determination of the character of the "offense charged" in a given case, and of the lesser offenses necessarily subsumed therein. An assessment of what offenses the government has *proved* beyond those it charged can hardly be conducted without considering what the government's proof was.

The need for a complete method of determining what lesser offenses are included within a charged offense is

particularly great where, as here, the statute at issue is one that can be violated in a number of ways. Indeed, the past several years have seen the enactment of a number of criminal statutes than can be violated in various ways, and that in fact are specifically predicated on violations of any number of other legal provisions. *See, e.g.*, 18 U.S.C. § 1963 (RICO); and 21 U.S.C. § 848 (Continuing Criminal Enterprise). The mail fraud statute at issue herein, 18 U.S.C. § 1341, also defines a violation in terms of other offensive conduct. It does not, however, attempt to limit the specific varieties of pertinent conduct in order to afford the government broad authority to battle particular fields of crime. These statutes are umbrella-like and, especially where RICO and the CCE statute are concerned, carry extensive penalties. They are exactly the type of offenses for which consideration of lesser offenses is appropriate under Rule 31(c), but it is hard to imagine how any lesser included offense could even be considered under the elements test, precisely because these "greater" offenses are so broadly defined. The lesser offense, because of its specific nature, will always contain elements not necessary for conviction under the broader statute. It is this exact concern that recently led a panel of the Tenth Circuit, in three separate opinions, to conclude that both the "elements" test and the "inherent relationship" test are valid, and that the use of each should be dictated by the nature of the individual case. *United States v. Cooper*, 812 F.2d 1283, 1285-86 (10th Cir. 1987); *id.* at 1287 (Baldock, J., concurring); *id.* at 1289 (McKay, J., concurring and dissenting).

The majority also decries the "inherent relationship" test because it necessarily results in the abandonment of the rule of "mutuality," which allows one party to request an instruction on a lesser included offense only if the other party also could have done so. This rule is inconsistent with a test for lesser included offenses that takes into account the evidence introduced at trial because the government is not permitted to alter the charges con-

tained in the indictment when it submits them to the trier of fact if such alteration would prejudice the defendant, *i.e.* (as is relevant here) if the original indictment did not put the defendant on notice of the possibility of the alternate charge. *See generally Stirone v. United States*, 361 U.S. 212, 215-18 (1960); *United States v. Cina*, 699 F.2d 853, 857-58 (7th Cir. 1983). This latter rule, it should be noted, is the product of concerns for fairness at trial and the recognition of the role of an indictment in informing a defendant of the nature of the charges against him, as opposed to any specific concern for the relationship of the offenses to one another. The *Whitaker* court, in formulating the "inherent relationship" test, recognized that these principles of fairness would be violated if the government were permitted to submit an alternative charge to the jury that, although supported by the trial record, was not sufficiently foreshadowed by the indictment. Accordingly, that court determined that the principle of mutuality should be "dispens[ed] with" so that the "inherent relationship" test could be applied. 447 F.2d at 320-22.

I agree with the *Whitaker* court's conclusion that the principle of mutuality is not necessary to the fair administration of justice and that it is properly discarded in favor of the "inherent relationship" test. In an ideal world, where all lawyers would be omniscient, *both* sides would be able to request instructions on lesser offenses based on the full trial record, which would have been anticipated before trial by omniscient defense counsel. In the real world, however, fairness requires that the prosecution be allowed to request only instructions that could fairly have been expected prior to trial. Defendants should be allowed to request instructions based on all the information available to them at the time of the request, including the trial record, thereby waiving any claim that *they* were not on notice. It may be, as the *Whitaker* court concluded that this distinction gives no unfair advantage to defendants over prosecutors because prosecutors, who

bear the burden of proof, will be able to assess the likely state of the record in advance and make their charging decisions accordingly. 447 F.2d at 321. Even if there is some advantage gained by defendants due to the abandonment of mutuality, that advantage is outweighed by the interests of justice that favor continued adherence to the "inherent relationship" test. This is hardly the only area of criminal trial law in which different rights accrue to the two respective sides.[1]

II.

I turn now to an evaluation of the instant case under the test originally formulated in *Whitaker* and refined by this court in *Cova* and several preceding cases, as well as in the panel opinion in this case. A comparison of the elements of the two crimes, mail fraud and odometer alteration, reveals (as the majority concludes) that the latter does not fall within the former as they are

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[1] The majority also opines that it "seems desirable" that the same test be used for determining whether a lesser offense instruction should be given and for determining whether cumulative punishment and/or separate trial is permissible on two charged offenses. *Supra* p. 13. I do not see why this identity is required. If a more expansive test is used for instruction purposes, the result will be that in some cases both instructions will be allowed where the two offenses could be punished cumulatively or tried separately, *i.e.* where they are "separate" offenses under the elements test. I do not foresee any undesirable consequences flowing from this eventuality. If a defendant in such a case is acquitted on both charges he cannot be retried on either, not because of their relationship but because the acquittal itself acts as a bar. The same is true if the defendant if only convicted of the lesser offense; he could not be retried on the greater because his lesser conviction represents an implied acquittal on the greater charge. If he is convicted of the greater offense there is a *theoretical* possibility that the government could retry him on the lesser charge (because the jury never considered it), but this is highly unlikely. Of course, in a case such as the one I have just described the prosecution presumably would be free to charge both offenses initially and to seek consecutive sentences thereon.

defined in the statute; proof of odometer alteration is not an element of mail fraud. In fact, no particular crime or unlawful conduct (or, for that matter, particular lawful conduct) is proscribed by the mail fraud statute with the exception of the act of mailing or causing matter to be mailed. This illustrates an earlier point, *i.e.* that statutes like the mail fraud provision, broadly drafted to encompass whole classes of illegal activity, will have few if any lesser included offenses under the elements test. Nevertheless it is clear to me that when the indictment and trial record are taken into account, the offense of odometer tampering should be considered a lesser included offense of mail fraud in this case.

In the instant case, the mailings that were the subject of the charges against the defendant were not separate from the fraudulent *acts* of which he was accused, but followed those acts both logically and chronologically. The mailings of the title applications by the defrauded car dealers, which the government claimed were caused by the defendant, were the direct result of the sales of altered cars. These sales were in turn the result of the odometer alterations that the defendant now asserts are lesser included offenses. As the government proved *this* case, it *had* to prove odometer tampering because tampering led to sale, which led to mailing. Had the charged mailings occurred before the tampering and/or in furtherance of the scheme (*e.g.* a letter from defendant to a confederate instructing him on tampering procedures or to a dealer proposing a fraudulent sale), it would not have been necessary to prove any fraudulent conduct beyond that of devising the scheme.[2] As is frequently the

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[2] In view of this analysis, the original panel opinion may have gone farther than necessary in declaring generally that "there is an inherent relationship between mail fraud and the 'fraud' that underlies the mail fraud offenses." 776 F.2d at 1371. This may not always be the case, as the illustration in the text suggests. The analysis this court applied in *Cova* reflects, in my view, the correct use of information beyond the mere statutory elements by

case, though, the government proved fraud in this instance by proving execution. In this case it *had to* prove execution because the charged mailings would not have occurred if the fraud had not been carried out. In this case, therefore, "proof of the lesser offense [was] necessarily presented as part of the showing of the commission of the greater offense." *Whitaker*, 447 F.2d at 319 (footnote omitted).

III.

The conclusion that odometer tampering should be considered as a lesser included offense of mail fraud in this case does not complete the inquiry necessary to determine whether an odometer tampering instruction should have been given. Even if a lesser offense is included in a greater offense (either under the majority's test or under the *Cova* test), a lesser offense instruction should not be given unless the evidence permits the jury "rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater." *Keeble v. United States*, 412 U.S. 205, 208 (1973). *See also United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985). As Judge Swygert pointed out in his original panel opinion, this requirement serves two functions: it prevents a defendant from using a lesser offense instruction simply as a device to allow him to ask for mercy from the jury, and it preserves the district judge's domain over questions of law and the jury's over questions of fact. 776 F.2d at 1371-72. In the present case the defendant presented at trial a rational basis upon which the jury could have found him guilty of odometer tampering but not guilty of mail fraud. The district court therefore erred in denying the defendant's request for the odometer tampering instruction.

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concentrating on the case as charged and tried, even though this may reflect some difference with the *Whitaker* court's formulation. There is really no need to discuss in the context of jury instructions how a prosecutor would "generally" charge or prove mail fraud when a black-and-white indictment and a real evidentiary record are available.

At the close of the government's case, the defendant moved for a directed verdict of acquittal, basing his motion in part on *United States v. Galloway*, 664 F.2d 161 (7th Cir. 1981), *cert. denied*, 456 U.S. 1006 (1982), a case that concerned a nearly identical mail fraud scheme. In *Galloway* the defendant argued that his conviction under the mail fraud statute was precluded by the fact that the title documents mailed by the car dealers actually led to his capture, *i.e.* that they were counterproductive to rather than in furtherance of his fraudulent scheme. This court disagreed, concluding that the mailings were necessary to complete the retail sale of the automobiles and that they could not therefore be considered counterproductive to the scheme. 664 F.2d at 165, *distinguishing United States v. Maze*, 414 U.S. 395 (1974). In *Galloway*, however, the title applications that were contained in the unlawful mailings did not include odometer readings because none were required. This court noted that "[s]uch a requirement, of course, might have made detection of the scheme more likely." 664 F.2d at 165 n.7.

In his motion for a directed verdict, the defendant argued that the odometer readings in the title forms mailed in his case (the existence and inclusion of which were not disputed) made them counterproductive to his scheme as a matter of law. The district court correctly denied the motion, holding that whether the mailings (with readings included) were so counterproductive to the scheme that they could not fairly be said to have been in its furtherance was a question for the jury.[3] It is that holding, however, that required the court to grant the defendant's request for an odometer tampering instruction. The defendant himself conceded that he had tampered with the odometers. It was therefore a rational possibility that

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[3] Trial Transcript, p. 114. In his closing argument to the jury, defendant's counsel in fact argued that the mailings actually endangered the scheme to the point where they could not be considered "in furtherance." *Id.* at p. 173.

the jury could have convicted the defendant of odometer tampering while acquitting him of mail fraud because it found the mailing of the title forms inimical to the fraudulent car sale scheme. Because this rational possibility existed based on the record assembled at trial, the defendant was entitled to a lesser instruction on odometer tampering.

The test adopted today by the majority for determining the propriety of lesser offense instructions has one virtue: it is the simpler of the two to apply. In the end, though, it disserves the purpose for which such instructions are allowed by separating the inquiry from its proper foundation. That the *Cova* test is more complex is not so much the result of its own inherent difficulty as of the necessary complexity of trials. Where jury instructions are concerned, accuracy has always been the goal, both in the law as they state it and in the analysis of their support in trial records. I see no reason, either in Rule 31(c) or elsewhere, to turn to an antiseptic and unworldly formula, one which will, I believe, come to hinder both defense and prosecutorial efforts. Nowhere is this possibility made clearer than in *Cova*, the case that is overruled today. Accordingly I respectfully dissent from the affirmance of the defendant's conviction.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 21, 1988

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge *
Hon. THOMAS E. FAIRCHILD, Senior Circuit Judge

No. 84-1317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.

WAYNE T. SCHMUCK,
Defendant-Appellant.

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* Senior Circuit Judge Swygert heard oral argument and voted at the post-argument conference to reverse, adhering to the reasons stated in his opinion herein for the panel. 776 F.2d 1369. Because of illness, however, he has not participated further.

Appeal from the United States District Court
for the Western District of Wisconsin

No. 83 CR 56—BARBARA B. CRABB, Judge

JUDGMENT ORDER ON REHEARING

This cause was reheard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

SUPREME COURT OF THE UNITED STATES

No. 87-6431

WAYNE T. SCHMUCK,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

May 16, 1988